Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

RAUL GARCIA and LYDIA BUENO,

Petitioners,

v.

WESTERN UNION FINANCIAL SERVICES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Due Process Clause of the Fourteenth Amendment and Federal Rule of Civil Procedure 23 allow the district court and proponents of a class action settlement to assume that the settlement class is properly certified under Rule 23 criteria and the settlement is fair, adequate and reasonable, unless objectors can demonstrate otherwise?

2. Do the Due Process Clause of the Fourteenth Amendment and Federal Rule of Civil Procedure 23 prohibit using sham federal claims to create nationwide class action settlements in federal court in order to avoid the reach of state laws where (1) the defendants repeatedly obtained dismissals of the same federal claims in the state with unique laws regulating defendants' conduct and where one-third of the class members reside and the vast majority of the transactions at issue originated, (2) after those federal courts refused to exercise supplemental jurisdiction over the state law claims and before the cases were refiled in state court, copy-cat nationwide class actions were filed in federal court in another state with only 4% of the class and significantly weaker state laws, and (3) defendants suddenly declined to seek dismissal of the same federal claims, instead entering into coupon-only settlements releasing them from any liability under any state or federal laws for 10 years of unlawful conduct while paying class counsel $10 million in fees?

3. Can a settlement be fair, adequate and reasonable under Federal Rule of Civil Procedure 23 where neither the proponents nor the district court inquire as to the value of the claims released by the absent class members available under the laws of their own states and there is no evidence of the potential damages against the settling defendants under the state and federal claims plead and released?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Raul Garcia and Lydia Bueno.

Respondents:

In re Mexico Money Transfer Litigation (Western Union and Orlandi Valuta):

Luis Pelayo; Oscar Perales; Marcelo Garcia; Western Union Financial Services, Inc.; Orlandi Valuta; Orlandi Valuta Nacional; Integrated Payment Systems, Inc.; First Data Corporation.

In re Mexico Money Transfer Litigation (MoneyGram):

Raul Ross Pineda; MoneyGram Payment Systems, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAUL GARCIA and LYDIA BUENO, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit dated October 4, 2001 is reported at 267 F.3d 743 and is set forth in the Appendix, p. 1a. The December 21, 2000 Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 164 F. Supp. 2d 1002 and is set forth in the Appendix, p. 10a-61a. The Order of the United States Court of Appeals for the Seventh Circuit denying rehearing and rehearing en banc dated October 4, 2001 is set forth in the Appendix, p. 62a-64a. (2001 U.S. App. LEXIS 23757.) This petition arises from two judgments rendered in the District Court On December 21, 2000, which were consolidated in the appeal to the Court of Appeals for the Seventh Circuit. Supreme Court Rules 12.4, 14(i)(iv).

JURISDICTION

The statutory basis for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Seventh Circuit issued its order denying the petition for rehearing and rehearing en banc on October 29, 2001. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "...nor shall any State deprive any person of life, liberty, or property, without due process of law...."

Pursuant to this Court's Rule 14.1(f), the provisions of Federal Rules of Civil Procedure, Rule 23, California Financial Code Sections 1800, 1810.5, 1815, 1816, and California Business & Professions Code Sections 17200, 17203, 17204 are set forth in the Appendix beginning at 65a.

STATEMENT OF THE CASE

Defendants[1] provide wire transfers of money from the United States to Mexico. Plaintiff class members are persons who used defendants' services to send their money via wire transfer to persons in Mexico. Defendants advertised that for a small flat fee they would send a certain amount of money to the customer's designated recipient in Mexico. For example, a defendant might advertise that for $12 it would wire transfer $300 to Mexico. Unbeknownst to the typical plaintiff, however, defendants imposed an additional undisclosed fee when the customers' dollars were exchanged into pesos. Defendants performed this exchange internally and at a rate they set to be 8-12% higher than what defendants paid for the pesos on the interbank market.

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[1] As Respondents include both defendants and plaintiffs below as proponents of the settlements, the latter terms are used for clarity.

Defendants skimmed an additional 8-12% from every single transaction, using the customers' money entrusted to them, without ever disclosing this practice and contrary to their representations that only a flat fee was charged.

Defendants Western Union and MoneyGram made up 85% of the market. Many customers had no choice as these defendants often had the only agents to which money could be wired in the relatively undeveloped areas of Mexico. The majority of class members are extremely poor and uneducated, and many are migrant workers and/or undocumented. The money sent to Mexico often represents a substantial portion of their income, used to support their family members in Mexico. It is estimated that between 25% to 33% of the transactions at issue originated in California which has by far the largest population of persons of Mexican descent in the United States and members of the class.

Petitioners Raul Garcia and Lydia Bueno are California residents who used defendants' wire transfer services. On November 3, 1997, they filed lawsuits challenging defendants' practices in the Central District of California, *Garcia vs. Western Union Financial Services, Inc.* case no. 97-8118 RSWL and *Bueno vs. MoneyGram Payment Systems, Inc.* case no. 97-8117 RSWL. Both lawsuits alleged federal RICO (28 U.S.C. §§ 1961 et seq.) and discrimination claims (42 U.S.C. §§ 1981 et seq.) as well as claims under California's Financial Code (Cal. Fin. Code §§ 1800 *et seq.*), Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*) and Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code §§1770 *et seq.*), in addition to fraud and conversion claims, all on behalf of state-wide classes. Petitioners alleged that defendants violated California Financial Code § 1810 which requires companies transferring money to deliver "all monies received for transmission ... or give instructions committing equivalent funds to the person designated by the customer." *Id.* Petitioners also alleged violations of California Financial Code § 1815(a) that requires defendants to supply customers with a receipt that "shall clearly state the amount of all

commissions or fees." Defendants Western Union and MoneyGram successfully moved to dismiss the federal claims. The California district court granted leave to amend, however, Petitioners determined to refile their state law claims in California state court on behalf of statewide classes.

Before Petitioners re-filed their actions in state court however, on April 20, 1998, leaders of Hispanic community organizations Luis Pelayo and Oscar Perales filed a complaint in the Northern District of Illinois alleging causes of action for violation of the RICO statutes (28 U.S.C. §§ 1961 *et seq.*), federal discrimination claims (42 U.S.C. §§ 1981 and 1983), and claims under Illinois state law against Western Union Financial Services, Inc., Orlandi Valuta, Orlandi Valuta Nacional, Integrated Payment Systems, Inc., and First Data Corporation.[2] On that same date, Raul Ross Pineda filed a nearly identical complaint alleging the same claims against defendant MoneyGram Payment Systems, Inc. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367.

Despite successfully challenging the identical federal claims in the California actions, defendants did not challenge the claims in the Illinois proceedings. Instead, the parties immediately embarked on settlement discussions. On May 12, 1999, the parties submitted nationwide settlement agreements to the District Court for approval and requested preliminary certification of settlement classes.

That very same day, without even enough time to have read the voluminous documents submitted nor to have analyzed the issues, the District Court granted preliminary

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[2] Similar lawsuits were also filed in Texas against defendants alleging statewide classes (*Sandoval v. Western Union Financial Servs., Inc.*, case no. 20240; *Fernandez v. MoneyGram Payment Systems, Inc. et al.*, case no. M-99-005; *Villalobos v. Western Union Fin. Servs., Inc., et al.*, case no. C-5353-98-E). Another action was filed in the Central District of California on behalf of a nationwide class, *Ibarra v. Orlandi Valuta*, case no. SA CV-98-1011 GLT. Again, defendants Orlandi Valuta and First Data Corp. (Western Union's parent company) obtained dismissals of the federal claims. Importantly, this California District Court held that the claims under California's UCL and CLRA were viable and sufficiently pled.

approval and conditionally certified settlement classes. In *Pelayo*, the District Court certified a nationwide class composed of "All persons who have utilized defendants' Mexico Money Transfer services to wire money from anywhere in the United States to anywhere in the Republic of Mexico from January 1, 1987 through August 31, 1999." The *Ross-Pineda* settlement class was identical except the class period ran from January 1, 1988 through August 31, 1999.

The settlements released the nationwide class members' claims relating to defendants' wire transfer services arising under all state and federal laws and under any theory whatsoever. Class members receive no cash at all, but will be offered either two $4.25 coupons for each transfer or one $6 coupon for each transfer[3] which only can be used for the purchase of more wire transfers. The coupons expire in 35 months, regardless of how few are obtained or redeemed. The coupons are transferable but cannot be redeemed for cash. While defendants described the value of the coupons deal as $375,000,000, their own expert testified that only 50% of the class would be expected to claim the coupons and of that number only 20% to 30% of the coupons would actually be redeemed. Thus, the "value" of the settlements is actually $56,250,000 in coupons redeemed, even assuming defendants' own most favorable 30% redemption rate.

The settlements include *cy pres* funds of $4 million in *Pelayo* and $634,920 in *Ross-Pineda*.[4] The sole guideline is that they be distributed to unidentified charitable and community organizations serving "Mexican or Mexican-American causes." Both Mr. Pelayo and Mr. Ross-Pineda admitted that they want their organizations to receive a portion of the funds. Since their own class counsel and a representative of defendants are among those that will

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[3] Class members whose claims arose from January 1, 1987 through November 2, 1993, will receive coupons only for every 10 wire transfer transactions they made during that period.

[4] Initially, the *cy pres* fund was $2.3 million, about the same as Defendants' initial cash offer of $2.7 million to settle the entire case.

determine how the funds are distributed, they may be so rewarded.

The settlements require that defendants disclose that they "recover revenue on the difference between the foreign exchange rate charged customers and the foreign exchange rate that defendants pay for pesos," but defendants are not required to disclose that rate. The defendants are to establish a toll-free number where customers can obtain an exchange rate.

Aside from doling out coupons, the settlements do nothing to redress defendants' practices. All of defendants' obligations under the settlements expire in 60 months at which time they are free to resume their practices without any restrictions. In the meantime they also remain free to raise their service charges, and can continue to retain a portion of their customers' money by use of the artificial exchange rate. Defendants are not even precluded from increasing their exchange rate or the amount of revenue they derive from their challenged practices. Nothing prevents these companies who control the market from raising prices or their exchange rate to cover the cost of the coupons and the settlements.

While the class members get a few coupons which can only be used to give defendants more business, their counsel will be paid $9,000,000 in attorneys fees in *Pelayo* and $1,428,571 in *Ross-Pineda*, with defendants to pay costs.

On July 29, 1999, Petitioners were granted leave to intervene in the Illinois District Court. Petitioners objected to the settlements on the grounds that, *inter alia*, the settlements did not meet the Rule 23 criteria. Petitioners also pointed out that classes interests had been shopped to Illinois and away from California so that defendants could avoid the reach of states with laws specifically regulating their conduct. Petitioners objected that the interests of the one-third of the class hailing from California should be determined under their own state's unique laws regulating wire transfers.

A fairness hearing was conducted on December 10, 1999, January 18-20, and August 18, 2000. On December 21, 2000, the District Court granted final approval of the settlements and certification of the classes under Rule 23.

The District Court overruled Petitioners' objections finding that classes met the Rule 23 requirements and that the settlements were fair, adequate and reasonable. Contrary to the evidence and opinions submitted by the California Attorney General, a Resolution enacted by the California Senate, and state and federal legislators including the author of the Financial Code provisions, the court found that the overwhelming interests of the majority of class members and California state law did not justify allowing the California class members the benefit of their own laws. The District Court did not undertake any analysis of the laws of other states. Final judgments were entered and injunctive relief ordered pursuant to the settlement agreements that same day.

Petitioners timely filed their notice of appeal to the United States Court of Appeals for the Seventh Circuit on January 19, 2001. Fed. R. App. P. 4(a)(1); 28 U.S.C. § 1291. The District Court's decision was affirmed on October 4, 2001.

The Court of Appeals opinion was based upon its expressed notion that defendants had done nothing unlawful. The Court of Appeals decided that defendants are not in the business of transmitting a customer's money but rather in the business of *selling* the customers' money and the case was really about a retail mark-up, regardless that the customers were already being charged a service fee for the wire transfer. According to this logic, when a parent wires money to a child in need using defendants' services, the defendant is not merely conveying the parent's money to the child for a fee; the parent is giving money to the defendant who then "sells" the money at a price it chooses, in addition to the service fee, transferring what is left to the child.

This ad hoc merits determination did not rely on an analysis of the laws of the different states where the class members reside or even the federal laws plead. Nonetheless, the Court of Appeals acknowledged that class treatment may be inappropriate where recovery may depend upon the varying laws of the states. The court stated, the settlements' proponents had "...confined their theories to federal law plus aspects of state law that are uniform...." App., p. 5a. Yet this ignored one of the primary points raised on appeal, that the proponents had failed to undertake this inquiry altogether and there was no analysis or evidence to show whether the laws of the 50 states were uniform or widely divergent. The Court of Appeals then formulated a new Rule 23 inquiry:

> Instead of requiring the plaintiffs to conduct what may be a snipe hunt, district judges should do what the court did here: Invite objectors to identify an available state-law theory that the representatives should have raised, and that if presented would have either increased the recovery or demonstrated the inappropriateness of class treatment. App., p. 6a.

The court held that this approach is proper where there is a federal claim (and although it thought the claims meritless as had three district courts before) and the parties seek certification of a settlement-only class.

The court also found that the claims under California law were not stronger than the RICO claim. Having decided that the case was about wholesale and retail sales of currency, and not wire transfers, it found that the California Financial Code did not require that defendants disclose the difference between the wholesale and retail prices of the money they sell. The court never explained how its theory withstood California's Financial Code provision stating that defendants held the customers' money in trust during the wire transfer. Cal. Fin. Code § 1816 (The customer's money

"... shall constitute trust funds owned by and belonging to the person from whom they were received....")

Petitioners filed a petition for rehearing and rehearing en banc on October 18, 2001, which was denied on October 29, 2001.

REASONS FOR GRANTING THE WRIT

I. FORUM SHOPPING FOR FEDERAL JURISDICTION CAN NOT BE USED TO AVOID STATE LAW AND VIOLATES RULE 23 PROTECTIONS AFFORDED ABSENT CLASS MEMBERS

This case presents a new twist on the evils of forum shopping. Typically, forum shopping concerns class plaintiffs seeking the forum state having the substantive law most favorable to their cause. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981); see also Gita F. Rothschild, Forum Shopping, 24 *Litigation* 40, 40 (Spr. 1998) ("The expansion of personal jurisdiction in *International Shoe Co. v. Washington*, together with the nationwide business activities of many large enterprises, have increased plaintiffs' forum options and made forum shopping a common practice.") Here, defendants shopped for a federal court as far removed from California, its laws and the majority of the class members, as possible so that they could engineer a cram-down settlement which they well knew would never see the light of day elsewhere.

Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985) permits multi-state class actions and the application of the laws of different states where there exist significant contacts between the forum state and the class members' and their claims thus preventing the class action device from becoming a vehicle for forum shopping. *Shutts*, 472 U.S. at 821; Arthur R. Miller and David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1 (1986). By permitting sham federal claims as a means to manufacture federal

jurisdiction, the fundamental due process protections of *Shutts* are shorn away leaving the absent class members bereft of the protections of the laws of their own states. This problem is magnified when, as here, the nature of the state law claims and their value to the class members are unknown.

The defendants decided not to seek dismissal of the federal claims in the Illinois District Court because they knew that with the federal claims gone, the District Court would likely refuse to exercise supplemental jurisdiction over the state law claims, as had happened in the California federal actions, and the cases would end up in Illinois state court. There, *Shutts* would forbid the extraterritorial application of Illinois law to the nationwide class as there was a complete absence of contacts, significant or otherwise, between Illinois and the claims of persons who reside and conducted their transactions outside of Illinois. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996). Defendants would then face class members' claims brought under their own, stronger, state laws, preventing defendants from imposing the sort of cram-down settlement which the Illinois District Court approved.

II. PLACING THE BURDEN UPON TO SHOW THAT A SETTLEMENT CLASS MEETS THE RULE 23 REQUIREMENTS DEPRIVES THE ABSENT CLASS MEMBERS OF FUNDAMENTAL DUE PROCESS PROTECTIONS

The Court of Appeals held that district courts should: "Invite objectors to identify an available state-law theory that the representatives should have raised, and that if presented would have either increased the recovery or demonstrated the inappropriateness of class treatment." App., p. 6A. This novel standard conflicts with the fundamental protections afforded absent class members embodied in Rule 23. The Rule 23(a) and (b) criteria act as safeguards for the absent

class members, to protect the class members from the District Court's "gestalt judgment or overarching impression" of a settlement's fairness. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).[5]

A validly certified class must meet all four of Rule 23(a)'s prerequisites: numerosity, commonality, typicality, and adequacy of representation. *Amchem*, 521 U.S. at 613-614. The party seeking to certify a class bears the burden of proving that each criterion is met. *Amchem*, 521 U.S. at 614. Since settlements lack the mettle forged in adversarial proceedings, this Court emphasized the importance of applying the class certification requirements of Rule 23 (a) and (b) separately from its fairness determination under Rule 23 (e). *Amchem*, 521 U.S. at 620-623. Thus, where the request is for a settlement-only class certification, the specifications of Rule 23 "demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620.

This imposes a fiduciary duty upon a district court to protect the interests of the absent class members. *United States v. City of Miami, Fla.*, 614 F.2d 1322, 1331 (5th Cir. 1980) (court has "role as a fiduciary serving as guardian for the unrepresented class members" and must "guard against settlements that may benefit the class representatives or their attorneys at the expense of absent class members"). A district court cannot merely rely on counsel's assurances. "[T]he court must independently analyze the evidence and recommendations before it, to assure that the interests of absent class members are protected. [Footnote omitted.]" 2 Newberg on Class Actions (Third Ed.), §11.43 at 11-95 - 11-96.

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[5] Moreover, the Court of Appeal's analysis is without support in the record below. Objectors were never "invited" to provide the district court with an analysis of variations of state law. Petitioners stepped forward to register their objections because they, as California citizens, were aware of the strength of their claims under California law which in combination with the vast number of class members in California explained why defendants maneuvered nationwide settlements out of California and into Illinois where but a fraction of the class members reside and there are no laws specifically regulating wire transfers.

The Court of Appeal's opinion conflicts with Rule 23 by relieving the court and settlement proponents of their responsibility to the absent class members. Instead the Court of Appeals wants to place that burden upon those objecting to the settlement, assuming that is, any objectors come forward. Consideration of this issue is necessary not only to secure and maintain uniformity of the decisions of the federal courts under Rule 23, but to protect the class. Allowing the District Court to abdicate its due process obligation leaves the settling foxes in charge of the henhouse.

A. A District Court Cannot Dispense With The Typicality Inquiry

"Typicality of claims in a settlement class context requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg on Class Actions, *supra*, § 11.28, at 11-58. See *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980). "[A] plaintiff's claim is typical if it arises from the same ... course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." 1 Newberg, *supra*, § 3.1, at 3-76; *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982). The typicality requirement assesses "whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented," and is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 631 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997). Where, as here, the claims of the absent class members are unknown, there is no way to determine if conflicts exist.

Here, the District Court could not possibly have found typicality because it had no evidence of the nature of the class members' claims or the legal theories. The Court of

Appeals also relied solely upon the federal claims to find typicality. However, the complaints submitted for certification were nationwide in scope and were based not only on federal claims but also upon Illinois and statutory and common law claims. These Illinois claims were the springboard for the settlements' release of all claims available under the laws of all 50 states. Yet the only state law claims which were briefed for the District Court were those of Illinois and California, and only at the insistence of Petitioners as objectors. The District Court's statement that there was no evidence that "claims not asserted in this case, but available under any individual state's laws, would be more viable or provide for more substantial recovery " was meaningless where no one had submitted evidence regarding the other 48 states and the District Court never undertook an independent inquiry. App., p. 32a.

B. Rule 23's Adequacy of Representation Requirement Can Not Be Met Where The District Court Forgoes Any Substantive Inquiry

These concerns carry over into the adequacy of representation inquiry which requires that the named representative plaintiffs "will fairly and adequately protect the interests of the class." Rule 23(a)(4). This requirement serves to reveal conflicts of interest existing between the named representative plaintiffs and the class they seek to represent. *Amchem*, 521 U.S. at 625-27; *Falcon*, 457 U.S. at 157-158, n.13 (1982). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem* 521 U.S. at 625-626 (internal quotation omitted). The District Court's finding on this issue was based upon assumptions regarding the nature of the state law claims held by absent class members, but assumptions or conclusory allegations cannot shoulder the burden of proof, or there would not be any point to the inquiry or the District Court's obligations to the class under Rule 23.

Given that adequacy of representation protects the different, separate, and distinct interest" of the class members (*Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986) (*en banc*)), "[a] class is not fairly and adequately represented if class members have antagonistic or conflicting claims." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *Falcon*, 457 U.S. 147, 157-158, n.13 (1982). In assessing a class action settlement, the court "has the fiduciary responsibility of ensuring ... that the class members' interests [are] represented adequately." *International Union of Elec., Elec., Salaried, Mach., and Furniture Workers v. Unisys Corp.*, 858 F. Supp. 1243, 1264 (E.D.N.Y. 1994).

Placing the burden on objecting parties strips the absent class members of protection from settlement abuses. It presumes that objectors have the resources to protect the class' interests, and where they do not the proponents are free to sell the class members' interests at any price. Given Rule 23 (a) and (b)'s design to insure that a proposed class has "sufficient unity so that absent class members can fairly be bound by decisions of class representatives," *Amchem*, 521 U.S. at 621, where neither the district court nor the class representatives are interested in the nature and strength of the claims being released by the absent class members, any guarantee of unity and cohesiveness of the proposed class is fictive and so the very due process underpinnings that permit class proceedings are shorn away.

The Court of Appeals called this fundamental protection "...an obligation to find some way to defeat class treatment ...." App. 6a. This misconstrues the role of a representative plaintiff and the court. Acting for the interests of the absent class members is at the heart of the role of a class representative and is what legitimizes entering judgments for persons who never set foot in the courtroom. That protection, as recognized in *Amchem*, includes making sure that the fairness, reasonableness and adequacy of the settlement is measured against the rights of which the absent class members will be divested under their own states' laws per the release provisions of the settlement. In the complete

absence of any record on the variations of the laws of the states of the absent class members, whether or not the claims available under the laws of those states are indeed as the Court of Appeals described them, "marginal theories," cannot be determined.

The District Court's approach, expanded by the Court of Appeals, is reminiscent of the "across-the-board" rule jettisoned by *Falcon*. Under that former rule, district judges were required to assume that all members of a proposed class were situated similarly to plaintiff and to certify classes "across the board." This Court rejected that approach, holding that similarity of claims and situations must be demonstrated rather than assumed. This Court observed that "sometimes it may be necessary for the court to probe beyond the pleadings before coming to rest on the certification question .... Actual, not presumed, conformance with Rule 23(a) remains . . . indispensable." *Falcon*, 457 U.S. at 160.[6] Here, where the conformance of settlement classes was never demonstrated in favor of a new rule of presumption, the orders and judgments thereon cannot stand.

III. THE "COUPON-ONLY" SETTLEMENTS WERE NOT FAIR, ADEQUATE NOR REASONABLE

In order for the determination that the settlement is fair, reasonable, and adequate "to survive appellate review, the district court must show it has explored comprehensively all relevant factors." *Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983) (citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 434 (1968); *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir.1982).

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[6] That is equally true of Rule 23(b). Both the absent class members and defendants are entitled to the protection of independent judicial review of the plaintiff's allegations.

A. The District Court And Proponents Did Not Consider The Claims Available And Released By Absent Class Members' Claims Under Their Own States' Laws

Defendants' winking use of a federal claims allowed them to bypass any issue of choice of law or extraterritorial application of Illinois law. It fell to Petitioners as intervenors to raise these issues, and even then they were ignored by proponents and the District Court in favor of vague statements which could not be substituted for the District Court's independent duty to the class. Indeed, the evidence that the federal claims were sham and an effort to manufacture jurisdiction should have triggered a careful scrutiny by the District Court. The District Court's failure to analyze the laws of all relevant jurisdictions renders the global settlement unconstitutional. See *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1349 (7th Cir. 1996) (Eastbrook, J. dissenting) citing *Shutts*, 472 U.S. 797; *Richards v. Jefferson County*, 517 U.S. 793 (1996).

The evidence showed that the contracts were entered into at the various places throughout the 51 jurisdictions where each class member completed a send form, gave defendants their money, and received a receipt. Proponents'submitted evidence that transactions and class members are dispersed through every single one of the fifty United States and the District of Columbia, with large numbers of the transactions sent from such diverse locales as Arizona, California, Colorado, Florida, Georgia, Illinois, Michigan, New York, North Carolina, and Texas. There was nothing from which the District Court could even begin to analyze why the application of Illinois state law is preferable to the laws of any other state, or even why federal statutes are preferable to the laws of other states. This very issue and similar failings by defendants in other settlement proceedings has led district courts to refuse to certify settlement classes. *See In re Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Laughman v. Wells Fargo Leasing Corp.*,

1997 U.S.Dist. LEXIS 13614 (N.D. Ill. 1997). All 51 relevant jurisdictions are likely to be interested in ensuring that their consumers are adequately compensated in cases of economic loss, but many will have different conceptions of what is adequate compensation. *See e.g. Clement v. American Honda Fin. Corp.*, 176 F.R.D. 15 (D.Conn. 1997) (discussing variations in state unfair trade practices laws).

B. The District Court Could Not Make A Proper Determination Under Rule 23(e) Where There Was No Evidence Of The Amount of Potential Damages

Among the factors a district court considers to determine whether a settlement is fair, reasonable and adequate are: likelihood of recovery, or likelihood of success, amount and nature of discovery or evidence, settlement terms and condition, and the presence of good faith and absence of collusion. 2 *Newberg, supra*, §11.44 at 11-97; *Isby v. Bayh* 75 F.3d 1191, 1199 (7th Cir. 1996). This requires "a careful inquiry" into the settlement's fairness, and must "be especially careful and penetrating". *Mars Steel Corp. v. Continental Ill. National Bank & Trust Co of Chicago*, 834 F. 2d 677, 688-682, (7th Cir. 1987). However the burden of proving the fairness of the settlements still rests on proponents. *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir.1979), *cert. denied* 444 U.S. 870 (1979).

No evidence was offered to the District Court of how much money defendants' made through their unlawful practices. It was impossible for the District Court to gauge the value of the class members' claims as plead. Instead, all that it had before it were some "averages" for selected years, which were made up by the parties. Given the interests at stake, blind acceptance of such skeletal proffers without any attempt to consider or verify any underlying data is woefully insufficient. A key factor in consideration of any proposed Rule 23 settlement is whether the settlement is fair in light of the amount of money the defendants wrongfully obtained.

See e.g., Manual for Complex Litigation (3d 1995) § 30.42, at 239. Here, no one knows. Instead, the generalized statements and ranges of damages show that the coupon-only settlement was an excellent deal – for defendants. In addition to eliminating any state and federal liability for more than a decade of unlawful activity, defendants will retain staggering amounts of their ill-gotten gains. Defendants state that between 1994 and 1999, they handled over 45 million transactions. Even *assuming* (as did the District Court and proponents), that the average fee earned on each transaction was $25, defendants made $1.125 billion by their unlawful conduct *in just five years*. That does not even include the other seven years of transactions which will be released in exchange for *coupons* that obligate the victims to continue to use defendants' services.

The record also does not include evidence of the amounts of any potential recovery under federal claims, save for the agreed estimates of the parties, which are wholly insufficient for any searching analysis of fairness or adequacy. Nor does the record reflect the amount of potential recovery under plaintiffs' state law claims, or the laws of the states of the absent class members. Thus, there was no possible way that the District Court could have passed upon the settlement.

C. The Coupon-Only Settlements Were Not Fair, Adequate Nor Reasonable

The coupon-only settlements amount to a windfall for defendants. "The defendant receives a release from legal claims and the benefit of the consumers' increased incentives to purchase one of its products." Miller & Singer, Nonpecuniary Class Action Settlements, 60 Law and Contemp. Probs. 97 at 101 (1997). In truth, the coupons are nothing more than a court-sanctioned marketing tool. Defendants do not have to change their practices, the coupons most likely will not be used, and even if they are used they require the class members to continue to use defendants' services with the same or even a more inflated

exchange rate. Moreover, given defendants' market share, there is nothing to prevent them from raising their prices or increasing the exchange rate to account for the coupons.

"The true value of the certificates to the class depends on when the certificates will be used, how they will be used, and who will be using them." *In re Domestic Air Trans. Antitrust Litig.*, 148 F.R.D. 297, 322 (N.D. GA 1993). Here, proponents' own evidence is that the majority of the coupons will not be used by class members. The fraction that do will have a limited time to use them, and then only to put more of their money into defendants' coffers.

In contrast, the release could not be broader, forever relinquishing any claims of any nature whatsoever under state or federal law with regard to defendants' wire transfer services. In considering the exact same type of release, one court stated, "a defendant would normally be expected to pay a premium for this type of global peace." *Buchet v. ITT Consumer Fin. Corp.* 845 F.Supp. 684, 697 (D.Minn. 1994) *as amended*, 858 F.Supp. 944 (1994). Defendants paid no such premium in this case.

III. The Court of Appeals Opinion Misapprehends The Nature of Wire Transfers And The Absent Class Members' Claims Available Under California's Unfair Competition Law

Neither the decision of the District Court nor the Court of Appeals appreciated the interests of the California class members. This is demonstrated by the courts' analyses of the Financial Code provisions which assumed that they provide no private right of action and only administrative enforcement by the director of California's Department of Financial Institutions. Their analysis failed to comprehend California's UCL, (Cal. Bus. & Prof. Code §§ 17200 *et seq.*), a powerful weapon available to any member of the public to redress conduct that is not only unlawful, but even merely "likely to deceive." *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992),

citing *Committee on Children's Television, Inc. v. General Foods Corp*, 35 Cal.App.3d 197, 211, 197 Cal.Rprt. 783, 673 P.2d 660 (1983). A UCL action is a *representative* action and may be brought by *any* person, even one who never used defendants' service. Cal. Bus. & Prof. Code § 17204. A UCL action can be brought for the violation of *any* law, statutory, penal or civil, regulatory, administrative, or even common law. *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-839 (1994). Moreover, it reaches not just unlawful conduct but conduct that is merely unfair or likely to deceive. It is dramatically different than the Illinois consumer fraud statute alleged by plaintiffs (815 ILCS 505/2), and when understood explains exactly why defendants did everything they could to maneuver the case out of California. The UCL claim would have required them to disgorge every penny of their unlawful gains *and* to restore the money to the customers. Cal. Bus. & Prof. Code § 17203.

California has an entire statutory scheme which specifically regulates the wire transfer services provided by defendants which was enacted "to protect the people of [California] from being victimized by unscrupulous practices by persons receiving money for transmission to foreign countries." Cal. Fin. Code §§1800 *et seq.* The California Legislature found that many of its residents are victimized by misappropriation of funds and by fraudulent and deceptive practices, by wire transfer companies like defendants, and that many of the people using the services are unfamiliar with the financial system and face language barriers and other obstacles to protection of their rights in the transmission of funds to friends and relatives. Cal. Fin. Code § 1800. Thus, the legislature enacted a comprehensive scheme that controls and regulates the transmissions and provides customers with a private right of action against the licensee when the licensee fails to transmit all of the money or its equivalent. A violation of any provisions of the Financial Code is the basis for UCL action.

The more than one third of the millions of absent class members who reside in California are denied the

protection of their own laws first by forum shopping then the District Court's erroneous interpretations of California law. Despite this, the District Court's decision is reviewed only for an abuse of discretion, thereby resulting in a deprivation of the due process rights of California class members. The California class member have had their rights adjudicated under Illinois law and based upon erroneous interpretations of California law, and yet have no substantive right of appellate review of those interpretations. The claims of California class members and matters of California law should have been left to the courts of the State of California.

CONCLUSION

THEREFORE, Petitioners RAUL GARCIA and LYDIA BUENO request of this Court that it GRANT their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPECTFULLY SUBMITTED,

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(Any footnotes trail the end of each document.)
Nos. 01-1172 & 01-1176

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In the Matter of: Mexico Money Transfer Litigation

September 7, 2001, Argued

October 4, 2001, Decided

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JUDGES:
Before Bauer, Easterbrook, and Manion, Circuit Judges.

OPINIONBY:
Easterbrook

OPINION:

Easterbrook, *Circuit Judge.* "Send $ 300 to Mexico for $ 15." This tag line, typical of promotions by the two defendants (MoneyGram and Western Union, plus its subsidiary Orlandi

Valuta), is at the core of these consolidated class actions. Plaintiffs contend that "for $ 15" is fraudulent because the wire transfer companies collect for their services not only cash paid over the counter (the $ 15) but also the difference between the retail currency exchange rate quoted to customers and the wholesale (interbank) rate, for transactions of $ 5 million or more, at which the defendants buy pesos. Plaintiffs believe that the quoted price must include the difference in foreign exchange rates (the "FX spread", which averages about $ 25 per transaction) or that the defendants must at least reveal the price that they pay for pesos, so that the customers may work out the spread for themselves. The classes sought treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. § § 1961*-68, and state anti-fraud laws. Class representatives estimated that defendants make as much as $ 300 million per year from the FX spread, and they sought treble this sum, over many years, as damages. The proposed recovery thus ran into the billions of dollars.

The class got much less. The defendants – which contended that they have not committed fraud because they reveal exactly how many pesos will be delivered in Mexico for exactly how many dollars – were unwilling to pay very much on what they deemed a weak claim. Moreover, to curtail the risk of fraud, they were unwilling to pay any cash except to class members who established their identities. For many members of the class, who are either not lawful residents of the United States or otherwise unwilling to submit personal details, mandatory identification would block relief. So the parties settled the case on other terms. Defendants agreed to disclose in future transactions and advertisements that there is a FX spread and that each defendant sets its own retail price of pesos, and to provide a toll-free telephone number from which customers can learn the going retail exchange rate. They also agreed to provide class members with coupons entitling them to $ 6 off the price of one future wire transfer for every transfer made since November 1993. (To simplify the exposition we disregard some additional details, which may be found in the district court's opinion.) The face value of coupons to be

made available approaches $ 400 million. Finally, defendants agreed to pay about $ 4.6 million to organizations that assist the Mexican-American community; the parties call this "cy pres relief" in recognition of the fact that many class members will prove to be unidentifiable, will not claim their coupons, or will not use all coupons they receive. Finally, the defendants agreed to bear the expense of notifying the class (which normally must be borne by the representative plaintiffs, see *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974); White v. Sundstrand Corp., 256 F.3d 580 (7th Cir. 2001))* as well as the expense of administering the settlement; these outlays have been estimated at about $ 16 million, to which about $ 10 million in attorneys' fees will be added. After receiving notice under Fed. R. Civ. P. 23(c)(2), about 2,800 class members opted out, retaining their right to sue independently. Raul Garcia and Lydia Bueno intervened and objected to the settlement. The district court held a hearing under Rule 23(e), took testimony from the objectors and several expert witnesses, and later approved the compromise and entered the proposed consent decree. *2000 U.S. Dist. LEXIS 18863* (N.D. Ill. Dec. 21, 2000).

According to the objectors, the court should not have certified a nationwide class, or indeed allowed the litigation to proceed in Illinois (rather than California, where about a third of the class members reside). They also think that the class should have received more, and in particular should have been compensated in cash rather than coupons. Most of the objectors' arguments occasion little or no discussion. For example, their complaint about the location of the court not only overlooks the fact that RICO authorizes nationwide service of process, see *18 U.S.C. § 1965; Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671-72 (7th Cir. 1987)*, but also supposes that this suit has proceeded "in Illinois," as if the district court were exercising the power of that state. A state court might well have the necessary authority, see *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)*, but no matter. This suit is in a *United States* District Court, which exercises the judicial power of the nation. All class members and defendants live

within the territorial jurisdiction of the district court, given § 1965. If both the representatives and the defendants are satisfied with venue (which they are) individual class members have no complaint. Only two of the other objections require treatment: the propriety of class certification in light of potential differences among state laws, and the adequacy of the defendants' payments.

The district court found that the class meets all requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation), plus the requirements of Rule 23(b)(3) (predominance of common over individual disputes and superiority of class disposition). It is hard to quarrel with these conclusions. The class is very large; each individual claim is small; the defendants handled all wire transfers the same way. Sometimes class treatment will be inappropriate even if all of these things are true, when recovery depends on law that varies materially from state to state. See, e.g., *Isaacs v. Sprint Corp., 2001 U.S. App. LEXIS 18324* (7th Cir. Aug. 14, 2001); *Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).* The class representatives avoided this pitfall in two ways: first, they confined their theories to federal law plus aspects of state law that are uniform; second, they asked for certification of a class for settlement only, a step that the Supreme Court approved in *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997).* Given the settlement, no one need draw fine lines among state-law theories of relief. By relying principally on federal substantive law, the representative plaintiffs followed the pattern of antitrust and securities litigation, where nationwide classes are certified routinely even though every state has its own antitrust or securities law, and even though these state laws may differ in ways that could prevent class treatment if they supplied the principal theories of recovery. See, e.g., *In re Prudential Insurance Co. Sales Practice Litigation, 148 F.3d 283, 314-15 (3d Cir. 1998).* Many opinions, of which *Amchem is one, 521 U.S. at 625,* give consumer fraud as an example of a claim for which class treatment is appropriate.

Nonetheless, the objectors imply, these class representatives are inadequate because they failed to investigate and deploy every potential state-law theory. Why they should have an obligation to find some way to defeat class treatment is a mystery. It is best to bypass marginal theories if their presence would spoil the use of an aggregation device that on the whole is favorable to holders of small claims. Instead of requiring the plaintiffs to conduct what may be a snipe hunt, district judges should do what the court did here: Invite objectors to identify an available state-law theory that the representatives should have raised, and that if presented would have either increased the recovery or demonstrated the inappropriateness of class treatment.

Our objectors believe that they have found such a theory, rooted in a California statute regulating the performance of financial intermediaries that offer international money transfers. See Cal. Fin. Code § § 1800-27. The objectors see a plausible claim in almost every subsection of this statute. The district court analyzed them all and found that none of the subsections gives the class any advantage over RICO. We agree with that assessment. No purpose would be served by an exhaustive analysis, for one appears in the district judge's careful opinion. An example will suffice. Section 1810(a) states: "Every licensee or its agent shall forward all moneys received . . . or give instructions committing equivalent funds to the person designated by the customer". The objectors see in this an obligation to transfer funds at the wholesale FX rate. We see no discussion of the difference between wholesale and retail prices for foreign currency; the section seems designed instead to require that the intermediary keep its promise to transfer the funds. Of course we may have missed some subtle interaction among the sections of the California Financial Code, but enforcement is not committed to judges in the first instance. It is committed to the California Department of Financial Institutions, see Cal. Fin. Code § § 1817-19, 1821, 1826, and the Department has never considered it necessary for regulated institutions to disclose (or hand over to the customer) the FX spread. We know this not only from the absence of regulations (and enforcement actions) but also from the testimony in the Rule 23(e) hearing

of Stanley Cardenas, a former head of the Department. California gives substantial leeway to agencies in interpreting the laws they administer, see *Dobbins v. San Diego County Civil Service Commission, 75 Cal. App. 4th 125, 131 (4th Dist. 1999)*, and since the Department's view corresponds to an ordinary-language reading of the statute a claim under this law could not do the plaintiffs much good. (Plaintiffs responded to Cardenas's testimony with affidavits of legislators who supported the statute, but those views, offered away from the legislative halls and long after the law's enactment, are worthless. See *Lindland v. United States Wrestling Association, Inc., 227 F.3d 1000, 1008 (7th Cir. 2000).)* Any invocation of § 1810(a) and the rest of California's money-transfer legislation would encounter another hurdle: The statute does not appear to support a private action, except for enforcement of a single subsection. See Cal. Fin. Code § 1810.5(c). California respects a legislative decision to commit enforcement to an agency rather than private plaintiffs, see *Moradi-Shalal v. Fireman's Fund Insurance Cos., 46 Cal. 3d 287, 300, 758 P.2d 58, 250 Cal. Rptr. 116 (1988)*, making it hard to see how the class could have used § 1810 and its cousins to advantage. The class representatives cannot be branded as inadequate on account of their decision to abjure reliance on California law.

Let us turn, then, to the adequacy of the settlement. This is one of many class actions in which everyone other than the plaintiffs has been paid in cash. The attorneys got cash, the charitable organizations got cash, and the customers got coupons. That's enough to raise suspicions – especially because coupons serve as a form of advertising for the defendants, and their effect can be offset (in whole or in part) by raising prices during the period before the coupons expire. Maybe class actions would be prosecuted more vigorously if the class and class counsel had to accept the same coin. But the objectors do not say that the lawyers have been overpaid; they say that the customers have been underpaid. And that contention cannot be evaluated by stopping with the fact that compensation in kind is worth less than cash of the same nominal value. (Coupons are stand-ins for the wire transfer service, making them a form of in-kind payment.) Instead one

must ask whether the value of relief in the aggregate is a reasonable approximation of the value of plaintiffs' claim. Prospective relief to which the defendants have agreed will alert class members to the FX spread and promote competition that may drive the retail price of pesos closer to the interbank price; that is not an outcome to be sneered at. And the coupons, too, have value.

Not the $ 400 million face value, surely. Experts estimated that about half of the coupons would be claimed, and 20% to 30% of those claimed would be used, implying a net value of $ 40 million to $ 60 million. That conclusion is supported by the analysis of other coupon settlements and some survey research exploring the likely behavior of this class. Persons who transfer money to Mexico do so an average of 14 times annually, providing ample opportunities to use the coupons independent of their effect in stimulating demand. The coupons can be used throughout a 35-month period, and, because they are transferable, even class members who do not again use defendants' services may obtain some value (if not by selling them, then by giving them to relatives).

Were the class's claims worth more than $ 40 million, plus the cy pres relief, plus the value of the injunction? Like the district court, we think not – indeed, we think that the claims had only nuisance value (including their value in generating bad public relations for the defendants). This settlement is more in the nature of a PR gesture, coupled with a goal of freedom from a drumbeat of litigation (similar suits have been filed in many state and federal courts across the nation), than an exchange of money (or coupons) for the release of valuable legal rights. No state or federal law requires either currency exchanges or wire-transfer firms to disclose the interbank rate at which they buy specie, as opposed to the retail rate at which they sell currency (and the retail price is invariably disclosed). That is why the plaintiffs have been driven to make generic fraud claims. But since when is failure to disclose the precise difference between wholesale and retail prices for any commodity "fraud"?

Money is just a commodity in an international market. See *Dunn v. CFTC, 519 U.S. 465, 137 L. Ed. 2d 93, 117 S. Ct.*

913 (1997). Pesos are for sale – at one price for those who buy in bulk (parcels of $ 5 million or more) and at another, higher price for those who buy at retail and must compensate the middlemen for the expense of holding an inventory, providing retail outlets, keeping records, ensuring that the recipient is the one designated by the sender, and so on. Neiman Marcus does not tell customers what it paid for the clothes they buy, nor need an auto dealer reveal rebates and incentives it receives to sell cars. This is true in financial markets no less than markets for physical goods. The customer of a bank's foreign-exchange section (or an airport's currency kiosk) is quoted a retail rate, not a wholesale rate, and must turn to the newspapers or the Internet to determine how much the bank has marked up its Swiss Francs or Indian Rupees. The holder of a checking account may be promised a small interest rate (say, 2%) on the balance and is not told at what rate the bank lends these funds to its own customers. Nor need the bank, or an intermediary such as MoneyGram, explain to customers how it profits from the float on funds it holds for a day or two between receipt and delivery. MoneyGram and Western Union revealed truthfully, and separately, the exchange rate they offered (the price per peso) and the rate for the wire transfer to Mexico. Each customer was told how many dollars in the United States would result in how many pesos delivered in Mexico. Nothing in this transaction smacks of fraud, so the settlement cannot be attacked as too low.

Affirmed

Nos. 98 C 2407, 98 C 2408

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

IN RE MEXICO MONEY TRANSFER LITIGATION

(WESTERN UNION AND ORLANDI VALUTA);

**IN RE MEXICO MONEY TRANSFER LITIGATION
(MONEYGRAM)**

December 21, 2000, Decided

December 27, 2000, Docketed

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For LUIS PELAYO, OSCAR PERALES, plaintiffs (98-CV-2407): Maria G. Valdez, Mexican American Legal Defense & Educational Fund, Chicago, IL.

For RAUL GARCIA, LYDIA BUENO, plaintiffs (98-CV-2407): David J. Stetler, Jonathan M. Cyrluk, Stetler & Duffy, Ltd., Chicago, IL.

For AMICI, plaintiff (98-CV-2407, 98-CV-2408): Arturo Jauregui, Jauregui & Cisneros, Chicago, IL.

For LEONARD ANDRADE, plaintiff (98-CV-2407): Mark Peter Brown, Santa Maria, CA.

For RAUL ROSS PINEDA, plaintiff (98-CV-2408): Robert L. Graham, Jenner & Block, Chicago, IL.

For RAUL ROSS PINEDA, plaintiff (98-CV-2408): Matthew J. Piers, Jonathan A. Rothstein, Joshua Karsh, Gessler, Hughes & Socol, Ltd., Chicago, IL.

For RAUL ROSS PINEDA, plaintiff (98-CV-2408): Howard William Foster, Johnson & Bell, Ltd., Chicago, IL.

For RAUL ROSS PINEDA, plaintiff (98-CV-2408): Timothy J. Crowley, Richard E Norman, Crowley & Douglas LLP, Houston, TX.

For RAUL ROSS PINEDA, plaintiff (98-CV-2408): Craig M Sico, Harris & Watts, Corpus Christi, TX.

For RAUL ROSS PINEDA, plaintiff (98-CV-2408): Nelson J Roach, Jeffrey John Angelovich, Nix Patterson & Roach LLP, Daingerfield, TX.

For RAUL ROSS PINEDA, plaintiff (98-CV-2408): Gregory Alan Pierce, Stephen E McConnico, Scott Douglass & McConnico LLP, Austin, TX.

For RAUL ROSS PINEDA, plaintiff (98-CV-2408): Maria G. Valdez, Mexican American Legal Defense & Educational Fund, Chicago, IL.

For WESTERN UNION FINANCIAL SERVICES, INC., defendant (98-CV-2407): William F. Conlon, Eric Stephen Mattson, Sidley & Austin, Chicago, IL.

For WESTERN UNION FINANCIAL SERVICES, INC., defendant (98-CV-2407): Richard J. Grad, Jennifer Altfeld Landau, Sidley and Austin, Los Angeles, CA.

For ORLANDI VALUTA NACIONAL, FIRST DATA CORPORATION, ORLANDI VALUTA, defendants (98-CV-2407): William F. Conlon, Sidley & Austin, Chicago, IL.

For MONEYGRAM PAYMENT SYSTEM, INC, defendant (98-CV-2408): Charles J. Risch, John Scott Monical, Lawrence W. Page, Lawrence, Kamin, Saunders & Uhlenhop, Chicago, IL.

For INTEGRATED PAYMENT SYSTEMS, defendant (98-CV-2408): William F. Conlon, Sidley & Austin, Chicago, IL.

For AMICI CURIAE, movant (98-CV-2407): Luis A Carrillo, Attorney at Law, Montesello, CA.

For RAUL GARCIA, LYDIA BUENO, movants (98-CV-2408): David J. Stetler, Jonathan M. Cyrluk, Stetler & Duffy, Ltd., Chicago, IL.

JUDGES:
REBECCA R. PALLMEYER, United States District Judge.

OPINIONBY:
REBECCA R. PALLMEYER

OPINION:

MEMORANDUM OPINION AND ORDER

In addition to the fee they charge for wire transfers of funds to Mexico, Defendants in these nationwide class actions collect the difference between the foreign exchange rate they charge their customers and the more favorable rate that Defendants themselves pay for pesos. In these consolidated actions, and a number of cases in other jurisdictions, Plaintiffs challenge Defendants' failure to disclose the exchange rate mark-up to their customers. After months of discovery and negotiation, the parties reached settlements. They now seek this court's final approval of their agreements, under which Plaintiffs' claims are released in return for discount coupons, an injunction, a *cy pres* fund, and attorneys' fees and costs.

This court had concerns about the wisdom and fairness of the coupon-based settlement proposed by the parties. In response to its own concerns and to objections voiced by individual class members and intervenors represented by counsel, the court conducted an unusually lengthy evidentiary hearing on December 10, 1999, January 18-20, 2000, and August 11, 2000. In addition to the evidence presented at that hearing, the court considered all parties' submissions, affidavits, and expert opinions on the fairness, reasonableness, and adequacy of the settlements. Several class members have objected to the terms of the settlements. The most significant objections were voiced by a group of California residents ("California Objectors" or "Intervenors") who argue that the availability of claims under California law renders the proposed settlements inadequate with respect to California residents. Having considered the record in its entirety, and giving appropriate consideration to the concerns expressed by the Intervenors, the court now grants approval of the proposed settlements, as explained in the findings and conclusions set forth herein.

FACTS

The facts generating these lawsuits are essentially undisputed. Defendants are engaged in the business of providing electronic fund transfers on behalf of clients seeking to transmit money to various locations in Mexico. Defendants include Western Union Financial Services, Inc.,

Orlandi Valuta, Orlandi Valuta Nacional, First Data Corporation (98 C 2407) and Integrated Payment Systems, Inc. (98 C 2408). As compensation for these services, Defendants charge their customers a transaction fee or service charge. In addition, Defendants recover revenue on the exchange rate. Although they receive dollars from their customers and provide pesos to the recipients at a disclosed rate, Defendants are able to purchase pesos themselves at a more favorable exchange rate. The difference between the exchange rate they make available to their customers and the exchange rate at which they purchase pesos (referred to here sometimes as "FX [foreign exchange] spread") provides Defendants with substantial additional compensation ("FX revenue"). Plaintiffs brought these lawsuits under a variety of theories to challenge Defendants' practice of recovering this additional compensation without disclosing it.

At the time of each transaction, Defendants' customers are given a receipt that discloses the service charge, the exchange rate being offered by the Defendants, and the number of pesos that will be paid in Mexico to the designated recipient. Defendants, who purchase pesos in the "interbank" (or wholesale) market in blocks of $ 5 million, pay an interbank exchange rate for those pesos. There is no "official" set rate for exchange in this market; instead, the rate is determined by market forces and fluctuates rapidly. Similarly, there is no official exchange rate in the retail market for pesos. For example, a survey performed by Jim Dibe, an international currency market expert, demonstrated that on a date when the interbank market rate for pesos was approximately 9.345 pesos to the dollar, 34 retail companies were selling pesos at prices that ranged from 7.93 pesos to the dollar to as many as 9.30 pesos to the dollar. (Declaration of Jim Dibe, at P 30.) On average, however, the difference between the retail exchange rate and the more favorable wholesale rate has been approximately 10%. (Plaintiffs' Consolidated Memorandum in Support of the Proposed Settlement of Each of the Nationwide Mexico Money Transfer Class Actions ("Plaintiffs' Memo"), at 4.)

In these cases, Plaintiffs alleged that Defendants' failure to disclose the existence of the FX spread to their customers

is fraudulent and that the fraud is exacerbated by misleading advertising in which Defendants emphasize the transaction fee in a way that suggests this is the only revenue they receive for each exchange, for example, "Send up to $ 300 to Mexico for only $ 15." In fact, according to Plaintiffs, customers are paying not "only $ 15," but rather $ 15 plus the amount of the FX spread. (98 C 2407 First Amended Complaint PP 20-24.) Plaintiffs allege violations of the federal RICO statute, breach of contract, fraud through misrepresentation, fraud through omission, conversion, breach of fiduciary duty, discrimination, and accounting/restitution. The complaints seek compensatory and statutory damages and penalties, prejudgment interest, attorneys' fees and costs and an injunction barring Defendants from collecting any FX revenue without disclosure of such revenue in all advertising.

Litigation History

Seven lawsuits challenging Defendants' practices are pending. Attorney Fred Kumetz filed two class action complaints on November 3, 1997 in federal court in Los Angeles: *Garcia v. Western Union Financial Services, Inc.*, Case No. 97-8118 RSWL (Rcx) and *Bueno v. MoneyGram Payment Systems, Inc.*, Case No. 97-8117 RSWL (Rcx). These lawsuits claimed violation of federal RICO and civil rights laws, among other claims, on behalf of a class of California customers. On August 4, 1998, the court granted a motion to dismiss the federal claims in these actions as inadequately pleaded, but granted leave to amend. Plaintiffs Garcia and Bueno chose not to do so, however, and instead filed complaints in state court alleging only California state law claims. *Garcia v. Western Union Fin. Servs., Inc.*, Los Angeles County Superior Court Case No. BC 197489 and *Bueno v. MoneyGram Payment Sys., Inc.*, Case No. BC 197490. Defendants' demurrers to these complaints were filed in November 1998.

Several additional lawsuits were filed, including the two pending before this court, originally entitled *Pelayo v. Western Union Fin. Servs., Inc.*, No. 98 C 2407 and *Ross-*

Pineda v. MoneyGram Payment Sys., Inc., No. 98 C 2408; two in Texas (*Sandoval v. Western Union Financial Servs., Inc.*, Case No. 20240 and *Fernandez v. MoneyGram Payment Systems, Inc. et al.*, Case No. M-99-005), both on behalf of state-wide classes; and another case in federal court in California, this one on behalf of a nationwide class, *Ibarra v. Orlandi Valuta, et al.*, Case No. SA CV-98-1011 GLT (C. D. Cal.). Yet another case was filed in Texas on behalf of a statewide class but voluntarily dismissed on January 6, 1999. *Villalobos v. Western Union Fin. Servs., Inc., et al.*, Case No. C-5353-98-E. On March 1, 1999, Defendants in the *Ibarra* case moved to dismiss, and on May 1, 1999 the federal court granted that motion in part, concluding that the RICO claims were insufficient and allowing leave to amend that complaint.

The two lawsuits before this court were initially assigned to Judge Ann C. Williams. At her direction, attorneys in these two cases and in the two Texas actions (hereinafter collectively "National Class Counsel") initiated settlement negotiations which lasted nearly a year and resulted in preliminary agreements which were presented to the court in 1999. Judge Williams suggested, and the parties agreed to, an enhancement to their proposed notice to class members, directing that Defendants post notices at their local agent offices. Defendants and National Class Counsel executed nationwide settlement agreements in May 1999.

National Class Counsel consists of well-respected plaintiffs' attorneys from eight law firms in Illinois (Matthew Piers of Gessler, Hughes & Socol, Ltd. and Robert Graham of Jenner & Block) and Texas (Steve McConnico of Scott, Douglas & McConnico; Nelson Roach of Nix, Patterson & Roach; Timothy Crowley of Crowley & Douglas, LLP; and Craig Sico of Harris & Watts). Attorneys for the proposed class in the *Ibarra* action in California also agreed to the terms of the proposed settlement, as did Mr. Kumetz initially. In May 1999, National Class Counsel filed amended complaints and the parties filed joint motions for class certification and preliminary approval of their settlement. On May 12, 1999, Judge Williams entered a Preliminary Settlement Order in each of these cases in which she certified a nationwide class, granted preliminary approval to the

settlement, and entered an anti-suit injunction which barred further prosecution of any claims that would be discharged in the settlement. On July 16, 1999, the court approved an amended class definition, approved the proposed notice provisions under Rule 23 and due process standards, established opt-out procedures, directed the parties to proceed with notice, and set a fairness hearing for December 10, 1999. The nationwide classes certified in the July 16 order consist of (1) all persons who used the Western Union and/or Orlandi Valuta electronic money transfer service to wire money from anywhere in the United States to the Republic of Mexico between January 1, 1987 and August 31, 1999 ("*Pelayo* settlement class") and (2) all persons who used the electronic money transfer service operated under the name MoneyGram to wire money from anywhere in the United States to the Republic of Mexico between January 1, 1988 and August 31, 1999 ("*Ross-Pineda* settlement class").

The California plaintiffs represented by Mr. Kumetz, Raul Garcia and Lydia Bueno, moved to intervene in these cases and to vacate the injunction against other litigation. Judge Williams granted leave to intervene on July 29, 1999. On October 13, 1999, she denied the motion to vacate the anti-suit injunction. On November 24, 1999, Judge Williams ordered the parties to the settlement and the objecting Intervenors to submit declarations in advance of the fairness hearing, setting forth the testimony of any witnesses they expected to call. Nationwide Class Counsel, Defendants, and the Intervenors did submit numerous declarations. In addition, on January 11, 2000, attorneys for the Intervenors filed two new class actions in California state court, *Amorsolo v. Western Union Fin. Servs., Inc.*, Case No. BC 222974 and *Amorsolo v. MoneyGram Payment Sys., Inc.*, Case No. BC 222973; because class members consist of persons who opted out of the classes in this case and persons who used Defendants' services after August 31, 1999, these lawsuits do not violate Judge Williams' injunction.

On January 12, 2000, National Class Counsel and Defendants amended the settlement of this case, enhancing the benefit to class members by narrowing the scope of the releases and doubling the size of a proposed *cy pres* fund.

Upon Judge Williams' elevation to her seat on the Court of Appeals, these cases were reassigned to this court. On May 22, 2000, this court granted the parties' motion for leave to provide appropriate notice of this amendment to persons who had opted out of the class and to certify newly identified class members.

This court has reviewed the terms of the proposed settlements in detail. In addition, to provide ample opportunity for presentation of objections and evaluation of the proposed settlement terms, the court conducted several days of evidentiary hearings in December 1999, January 2000, and August 2000. The evidence supports the conclusions set forth below.

DISCUSSION

A. The Negotiation Process

National Class Counsel and Defendants' attorneys submitted declarations describing the history of the settlement negotiations in this case, which consumed nearly a year. National Class Counsel initially demanded that Western Union provide the class with the choice of cash equal to Defendant's FX revenue of $ 388 million, plus interest (essentially, a full relief recovery) or coupons valued at three times that amount. Plaintiffs demanded, further, that Western Union modify its practices regarding collection of FX revenue, provide a toll-free number at which customers could obtain current rates, and make a contribution to Mexican-American charitable causes in an amount equal to the unclaimed cash available to class members. Western Union's initial counteroffer was for a $ 2.75 million cash settlement agreement and $ 22 million in coupons.

After further negotiations, National Class Counsel agreed to consider a coupon-only settlement agreement, if Defendants agreed that coupons would be fully transferable and could be used in connection with any other discounts or promotions. In addition, Plaintiffs insisted that the claims procedure be simple and non-cumbersome. Defendants initially resisted these demands, but after protracted

negotiations the parties reached an agreement in March 1999. Under the proposed resolution, the parties agreed to terms under which class members would receive two coupons worth $ 4.25 each for (1) each money transfer between November 3, 1993 and the end of the class period and (2) each 10 transfers from the beginning of the class period through November 2, 1993, in addition to equitable relief and a *cy pres* fund.

Only after this agreement was reached was there any negotiation concerning attorneys' fees for National Class Counsel. National Class Counsel began with a demand of $ 30 million; Defendants' initial offer was $ 1 million. The parties ultimately agreed that National Class Counsel would seek an award of $ 9 million in the *Pelayo* case and $ 1,428,571 plus expenses in the *Ross Pineda* case.

Fred Kumetz, who filed the *Garcia* and *Bueno* actions in California and who now represents five objectors to the proposed settlement here, participated in the settlement discussions. Although Mr. Kumetz declined Defendants' April 1999 invitation to Defendants participate in the negotiations with National Class Counsel, he did exchange proposals with Richard Grad, the attorney for Western Union. Western Union offered an all-coupon settlement and *cy pres* fund to resolve the *Garcia* case. Mr. Kumetz agreed to such terms but demanded an increase in the size of the *cy pres* fund and an increase from $ 4.25 to $ 7.00 of the face value of the coupons. Late in April, Western Union's attorney advised Mr. Kumetz that the agreement with National Class Counsel in the cases before this court provided for a nationwide settlement including two $ 4.25 coupons for each money transfer, a $ 2 million *cy pres* fund, an agreement to make certain disclosures in advertising, and an agreement to provide notice to class members via direct mail, print, radio and television advertising, and posting at agent locations. Mr. Kumetz asked that the terms of the nationwide settlements be amended to give class members one $ 6 coupon rather than two $ 4.25 coupons. National Class Counsel initially resisted this proposal, but ultimately agreed with Defendants and with Mr. Kumetz to an arrangement in which class members are given the option of choosing a $ 6 coupon or two $ 4.25

coupons. Believing that he had signed on to the nationwide settlement, Defendants' counsel then began a discussion of attorneys' fees with Mr. Kumetz. Only a few days later, however, in May 5, 1999, Mr. Kumetz advised the parties in these cases that he had changed his mind and would be objecting to the proposed agreements. Mr. Kumetz explained to Mr. Grad that he had changed his mind because he believed that National Class Counsel were critical of him.

B. The Terms of the Settlements

The settlements provide for distribution of discount coupons to class members; a *cy pres* fund; an injunction requiring disclosure of the FX revenue; and an award of atotnreys fees and costs. The specific terms are as follows:

1. Coupons: Each class member is entitled to receive coupons for discounts on future transfers of funds to Mexico. The coupons have an estimated aggregate face value of $ 270 million in the *Pelayo* action and $ 105 million in the *Ross-Pineda* action. Class members will have the option to choose either one $ 6.00 coupon or two $ 4.25 coupons for (1) every transaction from November 3, 1993 through August 31, 1999 and (2) for every ten transactions from the beginning of the class period (January 1, 1987 for *Pelayo* and January 1, 1998 in *Ross-Pineda*) through November 2, 1993. The parties agreed to less favorable terms for earlier transactions due to the Defendants' strong statute of limitations defenses to claims arising from those earlier transactions, but for any such transactions, the parties have agreed to round up to ten (for example, 1 of the earlier transactions will be deemed 10, and 11 will be rounded up to 20). The size of the average FX spread on the challenged transactions was approximately $ 25. Thus, the two $ 4.25 coupons or one $ 6.00 coupon represent a recovery at face value of between approximately 24% and 34% of the FX spread on an average transaction. The coupons will provide for discounts of up to 50% of the service charge on future fund transfers. The coupons are freely transferable, redeemable in connection with any other discount, sale or promotion, and valid for 35 months.

2. *Cy Pres* fund: Defendants have agreed to a *cy pres* contribution in the amount of $ 4,000,000 in *Pelayo* and $ 634,920 in *Ross-Pineda* to be distributed to charitable or public interest organizations that serve Mexican or Mexican-American causes. Each fund will be administered by a committee which will include Antonia Hernandez, the President and General Counsel of the Mexican-American Legal Defense and Education Fund ("MALDEF"); Arturo Vargas, the Executive Director of the National Association of Latino Elected and Appointed Officials ("NALEO"); Matthew Piers, lead counsel for the Plaintiffs in this case; and a representative of the Defendant(s) in each case.

3. Injunctive Relief: Defendants have agreed to entry of an injunction requiring: (1) that they disclose on customer receipts the fact that they recover revenue on the difference between the foreign exchange rate they charge customers and the foreign exchange rate that Defendants pay for pesos; (2) that their price-related advertising will disclose not only the service charge but the FX rate set for each transaction; and (3) that they will establish a toll-free number at which customers can obtain current FX rates. This injunction will be in effect for 60 months but may be extended at the request of National Class Counsel for good cause.

4. Attorneys' Fees and Costs: National Class Counsel will seek an award of $ 9,000,000 in *Pelayo* and $ 1,428,571 in *Ross-Pineda*. Defendants will pay reasonable costs, subject to court approval.

5. Notice and Administration: Defendants will pay the costs of extensive notice and will administer the settlement, a benefit the parties value at more than $ 16 million.

6. Release and Anti-Suit Injunction: In return, Plaintiffs agree to a release of claims asserted in these actions and the other five pending actions, including any and all claims challenging the exchange rate, any and all claims relating to disclosures or non-disclosures concerning the exchange rate or the FX spread or FX revenue, and any and all claims that the recovery of FX revenue is unlawful for any

reason. The court will issue an injunction barring any suit asserting these released claims.

C. Class Notice

Judge Williams approved a procedure under which notice of the settlement was provided to nearly 13.5 million unique names and addresses in the Defendants' computer records via first class mail. Defendant Western Union discovered in January 2000 that, due to a computer error, approximately 177,000 customers had been excluded from the records used to generate the initial mailing list; this court therefore ordered first-class mail notice to these additional class members.

Because transaction records did not extend as far back as 1987, and due to the concern that the addresses might be inaccurate, notice was also made through the electronic and print media. Print notice of the settlements appeared in 27 major English-language newspapers and 27 Spanish-language papers in nine states (California, Texas, New York, Florida, Illinois, Arizona, Georgia, North Carolina and Colorado); in 34 newspapers in Mexico, and twice in *USA Today*. A 30-second television announcement was broadcast in Spanish on the Univision television network eight times per week for two weeks and on 16 Spanish-language local television stations in the states of California, Texas, New York, Florida, Illinois, Arizona, and Colorado nine times per week for two weeks. The announcement was broadcast on four TV stations in Mexico. Further, the parties broadcast the announcement over 115 Spanish-language radio stations in the nine states in which the newspaper announcements appeared. This 60-second radio announcement ran 24 times per week for two weeks and was broadcast on 102 stations in Mexico, 25 times per week for two weeks. Finally, in addition to the direct mail and electronic media notice, Defendant prepared and distributed a print notice for posting by their domestic agents across all 50 states and established a toll-free number for class members seeking information about the settlements.

After the notice had been disseminated, the settlements were enhanced as described above. At the parties' request,

the court therefore directed that notice of the amendments be provided by first class mail to all class members who had opted out.

The court concludes this notice program, and the form of the notice itself, was complete and adequate to convey all relevant information to class members and afforded adequate opportunity to opt out or object. The notice included a description of the litigation and of the settlements, the right of class members to object or to opt out, notice of the time and place of the fairness hearing, and an explanation of the binding nature of the settlements. The notices were written in language as simple and plain as possible under the circumstances and were provided in Spanish and English. In addition to the announcements generated by the parties, the settlements have been the subject of substantial news media coverage. The court concludes that notice to the settlement class in this case satisfies the requirements of Rule 23 and due process.

D. Class Certification

Under Rule 23(a), a class may, be certified where "the class is so numerous that joinder of all members is impracticable (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). Judge Williams certified the settlement class at issue here in May 1999. As described below, the record supports her determination.

1. Numerosity: In each of these actions, the class definition includes "all persons who have used [one of Defendants' money transfer services] to transmit money from anywhere in the United States to anywhere in the Republic of Mexico" over a defined period of years. It is not possible to count the exact number of class members, but based on information regarding the volume and frequency of transactions, there are two to five million individuals nationwide who are members of the classes, with at least a

million members in each of the two settlement classes. Joinder of millions of class members is plainly impracticable.

2. Commonality: This requirement is readily met in most cases. *See generally Rosario v. Livaditis, 963 F.2d 1013, 1017-18 (7th Cir. 1992);* 1 Herbert Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 3.10, at 3-50 (3d ed. 1992). Because Defendants do business in much the same way at locations nationwide, a number of issues are common to the class members: whether Defendants misrepresented the price class members paid for sending money to Mexico; whether Defendants acted with fraudulent intent; whether Defendants' relationships with their agents in the United States and Mexico constitute "associated in fact enterprises" for purposes of RICO; whether Defendants breached the terms of their standardized contracts with customers by purchasing pesos at one exchange rate and then selling them, in effect, to customers at a higher, less favorable rate; and whether Defendants have an obligation to disclose the existence and amount of the FX spread to their customers.

3. Typicality: Class members claims need not be identical, as long as they are substantially similar. *Binion v. Metropolitan Pier & Exposition Auth., 163 F.R.D. 517, 524-25 (N. D. Ill. 1995).* The typicality test is met if named plaintiffs' claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)* (quotations omitted). Here, all class members' claims arise from Defendants' practice of giving class members a lower exchange rate for their dollars than Defendants themselves receive when they trade dollars for pesos in the wholesale or interbank market. Every class member, in each of the lawsuits filed, has asserted similar theories: that Defendants' FX practices constitute a fraudulent scheme carried out through a pattern of racketeering, conversion, breaches of fiduciary duty, and breaches of contract. Defendants' defenses to the claims of the named Plaintiffs are also identical to their defenses to the claims of all class members.

4. Adequacy of Representation: The purpose for examining the adequacy of class representation is to expose incompetent or ineffective class counsel and uncover any potential conflicts of interest between the class representatives and the remaining class members. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-27, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997).* There can be no genuine dispute concerning the competence or effectiveness of the attorneys who have represented these classes. National Class Counsel are experienced litigators who have vigorously prosecuted these cases. Nor does the court perceive conflicts between the named representatives and the other class members; as discussed more fully below, the court has concluded that California residents have no different claims, nor any stronger claims for relief, than do other members of the settlement classes. Representation is adequate here.

5. Predominance of Common Questions, Superiority of Class Action: For a class certified under Rule 23(b)(3), the court must find that common questions predominate over questions affecting individual class members and that a class action is superior to other available methods of adjudicating class members' claims. Those requirements are met here because all class members share a common grievance: all received fewer pesos in exchange for dollars than the number of pesos that Defendants were able to purchase for those dollars; and, all paid a transaction fee or service fee under circumstances that could have led them to believe this fee was the only compensation that Defendants received for their money exchange services. Although individual issues relating to reliance, causation, and damages exist, they do not predominate and do not preclude class certification. As discussed more fully below, the court concludes that to the extent California class members may press other claims, these claims are not superior to the common claims set forth in the complaints in these cases, including claims under RICO.

Further, because individual compensation claims average approximately $ 25 per transaction, the court concludes that individual claims would allow for a far less efficient and fair

resolution of the class members' claims. Nor do the manageability issues that might arise if this case were to be litigated preclude certification of a class for purposes of settlement.

E. Fairness and Adequacy of Settlement

Courts favor the resolution of a class action by way of settlement and will approve such a settlement if it is fair, reasonable, and adequate when viewed in its entirety. *Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996).* In evaluating a proposed settlement, the court recognizes that the "essence of settlement is compromise" and will not represent a total win for either side. *Id. at 1200,* quoting *Armstrong v. Board of Sch. Dir., 616 F.2d 305, 315 (7th Cir. 1980).* Accordingly, the court is not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from a settlement as they might have recovered from victory at trial. *See In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 534 (D.N.J. 1997), aff'd, 148 F.3d 283 (3d Cir. 1998); E.E.O.C. v. Hiram Walker & Sons, 768 F.2d 884, 889 (7th Cir. 1985).* In assessing the fairness, reasonableness and adequacy of a class settlement, the court must balance six factors:

(a) the strength of plaintiffs' case, weighed against the settlement offer;

(b) the complexity, length, and expense of further litigation;

(c) the presence of collusion between the parties;

(d) the opinion of competent counsel;

(e) the reaction of class members to the proposal; and

(f) the stage of proceedings and discovery completed.

See Donovan v. Estate of Fitzsimmons, 778 F.2d 298, 308 (7th Cir. 1985). The court addresses these factors below.

1. Strength of case balanced against the offer: As noted, Plaintiffs' complaints assert eight causes of action, including claims of violation of RICO, breach of contract, fraud through misrepresentation, fraud through omission, conversion, breach of fiduciary duty, discrimination and accounting/restitution. For the reasons described here, a balancing of the strengths of Plaintffs' case against the value of the offer weighs heavily in favor of the settlements.

(a) Plaintiffs' claims are uncertain.

(i) RICO and Fraud Claims

Plaintiffs claim a violation of *18 U.S.C. § 1962*(c), part of the RICO statute, which requires proof (i) that defendant has participated in conduct (ii) of an enterprise (iii) through a pattern (iv) of racketeering activity and (v) that the defendant's actions have proximately caused injury to plaintiff's business or property. *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985).*

Defendants argue with considerable force that Plaintiffs will be unable to prove predicate acts of mail or wire fraud. Defendants note that at the time of each of the challenged transactions, the class members received a receipt that sets forth the fee paid for the exchange, the exchange rate offered by Defendants, and the number of pesos that were to be conveyed to the recipient in Mexico. Although they acknowledge that the receipt does not disclose the fact that Defendants are able to purchase pesos at a more favorable exchange rate, Defendants argue that no such disclosure is required. As in any other commercial exchange, Defendants argue, they are entitled to recover a profit on their services without disclosing the amount of that profit.

Absent a legal requirement that information be disclosed, there is ordinarily no claim for fraud based on non-disclosure of the information. *See Northern Trust Co. v. VIII South Michigan Assocs., 276 Ill. App. 3d 355, 364, 657 N.E.2d 1095, 1102, 212 Ill. Dec. 750 (1st Dist. 1995); La Jolla*

Village Homeowners' Ass'n v. Superior Court, 212 Cal. App. 3d 1131, 1151, 261 Cal. Rptr. 146 (1989). According to Jim Dibe, virtually every company in the business of providing retail currency exchange services recovers at least some revenue from the FX spread. Neither Plaintiffs themselves, nor any of the Intervenors, has identified a basis in state or federal law that prohibits a money transfer provider from earning FX revenue. Professor Geoffrey Miller, a banking law expert who testified in support of the proposed settlement, explained that there is no law that requires a money transfer provider to disclose the rate at which it obtains foreign currency. Miller Testimony, Tr. 231:5-13.

Even if Plaintiffs could prove a fraudulent misrepresentation or omission, it is not clear that such a misrepresentation would relate to a material fact. Stanley Cardenas, formerly the head of the California Department of Banking (currently known as the Department of Financial Institutions), explained that from a customer's point of view, the material facts in a transfer of money to Mexico are (a) the amount of the service charge; (b) the exchange rate offered; and (c) the number of pesos the intended recipient will recover – all facts that Defendants fully and truthfully disclose. The fact that Defendants obtain pesos themselves at a far more favorable rate is arguably not relevant to the consumer at all. Nor is the wholesale rate paid by a retailer for any consumer product or service ordinarily disclosed to a consumer paying the retail price.

The exchange rate offered by Defendants is itself clearly disclosed on the customers' receipt, and the interbank exchange rate is published in Spanish and English language newspapers. In the only published opinion addressing a RICO and fraud claim based upon failure to disclose a foreign exchange rate margin, the district court held these circumstances defeated a showing of a specific intent to defraud. *See Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co., 785 F. Supp. 411, 424-25 (S.D.N.Y. 1992). See also United States v. Brown, 79 F.3d 1550, 1559 (11th Cir. 1996)* (where essential pricing information can be obtained, there is no mail fraud for failure to disclose investment potential of residential real estate or

re-sale value); *Blount Fin. Servs. v. Walter E. Heller & Co., 819 F.2d 151, 153 (6th Cir. 1987)* (no RICO claim based upon scheme to defraud where alleged misrepresentation could have been checked against public information). Defendants argue, further, that Plaintiffs here cannot establish justifiable reliance on Defendants' alleged failure to disclose where the true facts – i.e., the interbank exchange rates – are available. Finally, Defendants point out that Plaintiffs may well be unable to prove causation; market survey results suggest that many customers did business with Defendants for reasons of speed, reliability, security, or convenience, even though they were aware that Defendants charged more than some competitors.

To prevail under § 1962(c), Plaintiffs must prove the existence of a RICO "enterprise" that is separate from the alleged racketeering activity. Such an enterprise must be more than just a corporation, its employees, and its affiliates conducting the ordinary business of the corporation. *See Fitzgerald v. Chrysler Corp., 116 F.3d 225, 226-28 (7th Cir. 1997).* Defendants argue that Plaintiffs cannot prove a RICO enterprise here because all that exists is the ordinary business relationships of Defendants and other companies in the Mexican money transfer business. Indeed, deficiencies in pleading a RICO enterprise resulted in dismissal without prejudice of the RICO claims in the *Garcia*, *Ibarra*, and *Bueno* cases. Without deciding the issue, the court concludes this defense raises further uncertainty about the merits of Plaintiffs' RICO claims.

(ii) Breach of Contract and Conversion Claims

Plaintiffs' breach of contract and conversion claims are also vulnerable to challenge. Plaintiffs cannot assert any failure on the part of Defendants to comply with the literal terms of the agreements set forth in the receipts provided to customers at the time of their transactions. Instead, they point out that Western Union agreed to convert currency "at Western Union's rate of exchange in effect at the time the funds are received by Western Union," an ambiguous expression that might lead customers to believe their money transfers were being made at the same favorable rate that

Western Union enjoys when it purchases pesos on the interbank market. As Defendants contend, however, any such ambiguity in the general language is trumped by the more specific handwritten terms stating the number of pesos that the recipient would recover. Further, because their actions are arguably expressly authorized by the contract, Defendants cannot be guilty of conversion. Again, without deciding the issues, the court concludes Plaintiffs' contract and conversion claims are subject to strong defenses.

(iii) Breach of Fiduciary Duty Claim

Because commercial providers of goods and services do not generally owe fiduciary duties to their customers, Plaintiffs' claims of breach of fiduciary duty may be difficult to prove. Banks, escrow agents, and clearing brokers do not owe fiduciary obligations to their customers. *See, e.g., Carpenter v. Community Bank of Homestead, 710 So. 2d 65, 66-67 (Fla. Dist. Ct. App. 1998)*(bank); *F.G. Farah v. Mafrige & Kormanik, P.C., 927 S.W.2d 663, 675-76 (Tex. App. 1996)*(bank); *Bank Leumi Trust Co. v. Block 3102 Corp.*, 580 N.Y.S.2d 299, 301 (N.Y. App. Div. 1992)(bank); *Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476, 261 Cal. Rptr. 735 (1989)*(bank); *Hannon v. Western Title Ins. Co., 211 Cal. App. 3d 1122, 1129, 260 Cal. Rptr. 21 (1989)* (escrow agent); *Mars v. Wedbush Morgan Sec., Inc., 231 Cal. App. 3d 1608, 1614-15, 283 Cal. Rptr. 238 (1991)* (clearing broker). Malcolm Lucas, former Chief Justice of the California Supreme Court, testified at the hearing in this case that, under California law, in commercial relationships governed by specific instructions, there is no implied trust or fiduciary duty.

Defendants argue in this case that, like banks, they merely perform non-discretionary functions pursuant to contract terms, and that performance of those express terms cannot constitute a breach of fiduciary duty. The only reported decision to examine this issue has concluded that international wire transfer companies do not owe fiduciary duties to their customers. *See McDermott v. Western Union Tel. Co., 746 F. Supp. 1016, 1023 (E.D. Cal. 1990).* The

court therefore concludes that Plaintiffs' ability to prevail on their fiduciary duty claims is doubtful.

(iv) Discrimination Claim

Plaintiffs' discrimination claims are based on the allegation that Defendants impose a greater FX spread for money transfers to Mexico than they do for transfers to other nations. Such an allegation, if proven, would support a claim of disparate impact rather than intentional discrimination. Because proof of a claim of discrimination under *42 U.S.C. § 1981* requires evidence of discriminatory intent, this claim, too, is vulnerable to a substantial defense; in fact, the district judge in the *Bueno* and *Garcia* cases dismissed discrimination claims in those complaints for this reason. *Garcia v. Western Union Fin. Servs., Inc.*, CV 97-8118 RSWL (Rcx) (C.D. Cal. Aug. 4, 1998), Ex. A in Compendium of Exhibits Submitted by Defendants, slip op. at 27-29; *Bueno v. MoneyGram Servs., Inc.*, CF 97-8117 RSWL (Rcx) (C.D. Cal. Aug. 4, 1998), Ex B in Compendium, slip op at 30-32.

(v) Accounting and Restitution

Accounting and restitution are remedies, not independent causes of action. *See Nepomoceno v. Knights of Columbus, 1999 U.S. Dist. LEXIS 1366*, No. Civ. A 96 C 4789, *1999 WL 66570*, at *16 (N.D. Ill. Feb. 8, 1999), citing *First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1011 (7th Cir.1985); MRI Broadway Rental, Inc. v. United States Mineral Prods. Co., 242 A.D.2d 440, 662 N.Y.S.2d 114, 117 (N.Y. App. Div. 1997); Ghirardo v. Antonioli, 14 Cal. 4th 39, 51, 924 P.2d 996 (1996).*

For the reasons explained here, the court concludes that victory is far from certain with respect to any of the claims asserted by Plaintiffs here or in the related lawsuits. Moreover, in light of individual issues relating to individual class members' knowledge of the FX spread and reliance on the alleged fraudulent statements, certification of a class for litigation purposes is also uncertain. Class Counsel performed extensive research into the laws of Illinois, Texas, and California, as well as many other states. Apart from the California state law claims, addresssed below, there was no

evidence that claims not asserted in this case, but available under any individual state's laws, would be more viable or provide for more substantial recovery.

(b) Proposed settlement offers substantial value to class members.

Weighed against these considerations, the settlement proposals provide a substantial and immediate benefit to class members. In support of their petition for approval, the settlement proponents called Professor L. Manuel Garcia y Griego and Professor Geoffrey P. Miller. Professor Garcia y Griego is a nationally recognized expert on Mexican migration to the United States and the practices of Mexican nationals with respect to remittances to their home country. Professor Miller is Professor of Law at New York University Law School with particular expertise in banking law and regulation and class action litigation. Professor Miller is also a nationally recognized expert on coupon settlements. In addition, the court considered the declarations submitted by Dr. Carlos Arce, founder and President of NuStats International, a research and consulting firm that specializes in research relating to the Hispanic community, and Professor Michael Kamins, an expert on consumer behavior and advertising.

As noted above, the proposed settlements impose a five year injunction requiring Defendants: to notify their customers about the existence of the FX spread; to provide $ 375 million in discount coupons for use in future Mexico money transfers and a $ 4.6 million *cy pres* fund, and impose on Defendants the costs and expenses of notifying the class and administering the settlements, as well as Plaintiffs' attorneys fees and costs. The agreed order will direct Defendants to disclose the fact that there is a difference in the exchange rate paid by customers and the rate paid by Defendants themselves, and that Defendants retain this difference as revenue. It will also direct Defendants to disclose the FX rate in connection with any price-related advertising, including any advertising that quotes a service charge. Such an order will end the practices that gave rise to the claims asserted in these cases and the related litigation

and will eliminate any potential claim of deception or confusion. The toll-free number will enable customers to "price shop" from their homes. Because the three companies involved in these settlements constitute a large percentage of the market, they will likely impose these standards on the industry as a whole.

The consideration to be paid by Defendants is substantial. Out of pocket, Defendants must pay more that $ 20 million to cover the costs of notice and administration and to fund the *cy pres* fund. According to a survey conducted by Dr. Carlos Arce, self-report suggests a large majority of class members (76%) would complete a claim form to obtain coupons and a still larger proportion (90%) would use them. Dr. Garcia y Griego's testimony concerning the nature of the Mexican migrant community and its pattern of use of electronic money transfer confirms the survey results; he testified that he believed it "would be extremely unlikely if the coupons went unused." Tr. 505:15-16.

The court recognizes that self-report concerning coupon use is subject to question. Defendants' experts, Professors Miller and Kamins, testified that a more likely coupon redemption rate is lower – according to Miller's empirical analysis, "at least 20-30%" of the class members and according to Kamins, "greater than 25%." The testimony of the objectors' expert, Texas consumer law advocate Stephen Gardner, that the redemption rate would in fact be much lower, was not based on any empirical work and was less credible. Even with a projected redemption rate of 25%, the coupon program will have a cash value to the class members of $ 93.75 million (25% of $ 375 million). Defendants will, of course, bear the risk that the actual coupon redemption rate may be substantially higher.

The court recognizes the concern that a coupon-based settlement benefits class members only to the extent they are willing to do repeat business with the alleged wrongdoers. Here that concern is ameliorated in part by the evidence that most class members engage in money transfer transactions relatively frequently and that these Defendants account for the vast majority of the market. Further, courts in numerous

cases have recognized that coupon settlements can provide effective relief for class members. *See Cusack v. Bank United of Texas FSB, 159 F.3d 1040, 1041 (7th Cir. 1998)* (discount certificates for credits against mortgage closing costs); *Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 959-61 (E. D. Tex. 2000)* (approving settlement in which class members received "Toshiba Bucks" good only for the purchase of Toshiba products); *States of New York & Maryland v. Nintendo of Am., 775 F. Supp. 676, 682 (S.D.N.Y. 1991)* (distribution of $ 5 coupons approved as settlement of nationwide antitrust class action); *In re Cuisinart Food Processor Antitrust Litig., 1983 U.S. Dist. LEXIS 12412, M.D.L. 447, 1983 WL 153*, at *8 (D. Conn. Oct. 24, 1983) (approving settlement that provided for coupon discounts on Cuisinart products); *Ohio Public Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1 (N.D. Ohio 1982)* (approving settlement of class action where relief consisted of $ 20 million in $ 1.00 coupons). *See generally* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 Law & Contemp. Probs. 97 (1997).

As Professor Miller explained to this court, a well-designed coupon settlement can provide class members with more value than a cash settlement because the defendant is likely to be much more generous in its coupon offer: "Coupon settlements can be thought of as conserving the difference between wholesale and retail prices and passing this benefit on to the litigating parties." Miller Decl. P 32. Professor Miller noted, further, that coupons may "maintain or enhance existing customer relationships," a benefit that defendant may be willing to share with class members. Miller Testimony, Tr. 256:11-21; 257:22-25. In this case, Defendants refused to offer any amount for a cash settlement that would have resulted in recovery of even as much as $ 1.00 per class member, an amount far too small to justify issuance of the checks.

For several reasons, the court concludes that the coupon settlement proposed in this case is well-designed and effective. First, Defendants insisted that any cash payments would be made only after individual proof of identity and damages, a reasonable requirement because the court would

likely have required such proof following a trial. Because many class members work for low wages and/or lack lawful immigration status, a requirement of individual prove-ups would likely have discouraged the participation of undocumented workers. No such individual proof will be required for class members to recover coupons. Second, based upon the average FX spread on the challenged transactions of $ 25, the coupons represent a recovery of 24 to 34%. It is reasonable to assume that class members, who have used Defendants' transfer services before, will have need for such services in the future, and will have little difficulty finding an agent location from among the large network of Defendants' agents throughout the country. The coupons themselves are freely transferable and can be used at par value by any bearer. Professor Garcia y Griego believes such transfers are likely to occur among the extensive Mexican migrant community, and Professor Miller believes it is possible that a secondary market for such coupons will develop. The coupons will be available for immediate use and will remain valid for 35 months. They may be used in addition to any other discount or promotion, a provision Plaintiffs' counsel requested to minimize the possibility that such coupons become no more than a marketing tool for Defendants. Finally, the size of the coupons, which provide discounts of as much as 50% off the average transfer fee, encourages their retention and use by class members.

2. Complexity, length, and expense of further litigation: A second factor to be considered by the court is the complexity, length, and expense of litigation that will be spared by the proposed settlement. The court finds this factor significant. Defendants are highly motivated to defend these cases vigorously. Further litigation would undoubtedly require additional written discovery and depositions, including expert discovery. Unless the cases were promptly dismissed with prejudice on motions, further motion practice related to class certification, discovery, and summary judgment is inevitable. Proof of individual damages would be lengthy and cumbersome. Appellate practice is most likely. Here, as in *Isby v. Bayh, 75 F.3d 1191, 1199 (7th Cir. 1996)*, continued litigation would require resolution of

complex issues at considerable expense and would absorb many days of trial time.

3. Collusion between the parties: The California Objectors have expressed concerns about the timing of the filing of these cases and Defendants' failure to move to dismiss them. (*Intervenors' Proposed Findings of Fact and Conclusions of Law, at 29 P 39.)* The court does not find these circumstances suspicious, where Defendants had won motions to dismiss in other cases and were urged by Judge Williams to negotiate a settlement here. There is no evidence of any collusion between counsel for Plaintiffs and Defendants. To the contrary, negotiation of the settlements involved here took more than a year and were, in the words of counsel, "intense, vigorous, and at arm's length." (Proposed Findings of Fact and Conclusions of Law, at 70.) From time to time, both sides threatened to terminate negotiations before agreement was ultimately achieved. To eliminate any potential conflict of interest, the parties did not engage in fee negotiation until after the settlement of Plaintiffs' claims on their merits.

4. Opinion of competent counsel: This fourth factor weighs heavily in favor of the proposed settlement. National Class Counsel have appeared successfully in many class actions, including some matters before this court. The court knows of no basis for the suggestion that Plaintiffs' counsel are unable or unwilling to proceed to trial in this (or any other complex) case, and no such suggestion has been made here. All counsel have represented to this court that the negotiation process was difficult, contentious, and protracted and that, in their opinions, the proposed settlements are fair, reasonable, and adequate. Indeed, the attorney who now represents objecting parties himself participated in some of the settlement discussions, made at least one important suggestion that was adopted by the parties, and appears initially to have concurred with the fairness and reasonableness of the proposed deal. The court places significant weight on the unanimously strong endorsement of these settlements by Plaintiffs' well-respected attorneys. *See Isby, 75 F.3d at 1200; Williams v. Gen. Elec. Capital Auto*

Lease, 1995 U.S. Dist. LEXIS 19179, No. 94 C 7410, *1995 WL 765266*, at *10 (N.D. Ill. Dec. 20, 1995) (noting competence and professional responsibility of counsel in approving proposed settlement).

5. Reaction of class members: Although it is not possible to estimate the class size precisely, a conservative estimate suggests that there are between two and five million class members, many of whom have engaged in multiple transfer transactions, sometimes using names or variations of names that differ slightly. Defendants served first-class mail notice to more than 13.6 million unique names and addresses in their computerized transaction records. A significant portion (43%) of the notices were returned undeliverable (Tr. 515), perhaps a function of the mobility of the class and variations in the spellings of names. In addition to mail notice, as described earlier, notice was provided via television, radio, and newspaper advertising in the United States and Mexico, as well as by posting in agents' offices.

In response to this notice, only 25 objections to the settlements have been submitted in both actions combined. An additional 42 persons objected by way of correspondence to counsel or to the settlement administrator, a procedure which did not technically comply with the court's directions regarding objections. [1] Another 2,772 individuals opted out of the two cases; of these opt-outs, nearly 90% were the product of a campaign organized by Mr. Kumetz, the attorney for the objectors, and Mr. Lopez, president of an organization opposed to the settlements. The court has some skepticism about the significance of these opt-outs because Mr. Kumetz initially supported the agreements and Mr. Lopez offered to do so in exchange for a guarantee of *cy pres* funds. Nevertheless, 99.9% of class members have neither opted out nor filed objections to the proposed settlements. This acceptance rate is strong circumstantial evidence in favor of the settlements. *See In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 318 (3d Cir. 1998); In re Domestic Air Antitrust Litig., 148 F.R.D. 297, 326 n. 33 (N.D. Ga. 1993); In re Prudential-Bache Energy Income P'ships Sec. Litig., 815 F. Supp. 177, 182 (E. D. La. 1993).* The court notes, further, the approval of these settlements by

dozens of community organizations, community leaders, and elected officials. *See* Amicus Curiae Brief of National and Local Hispanic Organizations, Elected Public Officials, and Community Leadership, filed Nov. 22, 1999 (Doc. No. 104).

The court has received substantial written correspondence from California-based community organizations and from California elected officials opposing the proposed settlements, and is sensitive to the genuine concerns expressed by these individuals and groups. Indeed, before hearing the evidence at the fairness hearing in these cases, the court shared at least some of those concerns, including a concern that a coupon-based settlement offered no real compensation to class members and might even constitute a marketing device for Defendants. For the reasons set forth here, the evidence presented at the hearing has satisfied the court that the coupon-based settlements proposed in these cases are fair and reasonable under the circumstances presented here. Furthermore, given the challenges Plaintiffs face in proving their claims, the court believes the more significant component of the relief accorded by the settlements is the agreed injunctive order. In any event, the reaction of persons who are not themselves members of the class must not influence the court in its determination on the issues of fairness, reasonableness, and adequacy of a class action settlement. Nor is the court called upon to determine whether the proposed settlements are the best deals that could have been negotiated.

The court concludes that the reaction of class members to the proposed settlements is overwhelmingly positive.

6. Stage of proceedings: As explained in the declaration filed by National Class Counsel, their research and analysis of the claims in these cases began months before complaints were filed. Their efforts included interviews of hundreds of class members, as well as former agents and employees of Defendants. Plaintiffs' counsel considered a number of different forums for this litigation, and analyzed the strengths and weaknesses of available claims under federal law and the law of most of the 50 states, including California. National Class Counsel Declaration, P 4. Counsel in Illinois and Texas

performed substantial investigation and discovery, including review of 66,000 documents which consisted, *inter alia*, of financial and transactional records, business operations documents, market surveys, and advertising materials. In addition, counsel prepared and analyzed answers to extensive written interrogatories on the number of transactions at issue, the amounts of money sent, and the manner and method for setting exchange rates. Counsel also consulted experts and published materials concerning money transfers to Mexico. *Id.* PP 4, 14, 18. A settlement was reached more than one year later. Before finalizing the agreements, National Class Counsel took Rule 30(b)(6) depositions of Defendants' key employees and depositions of finance, information services, and customer service personnel to confirm information provided by Defendants in the settlement negotiations.

The court concludes that National Class Counsel had ample opportunity to reach an informed judgment concerning the merits of the proposed settlements.

F. Analysis of Objections to the Settlements

The court has carefully considered the 67 objections filed, as well as the objections voiced by seven individuals who appeared at the December 10, 1999 hearing. In addition to class members, the court has considered concerns expressed by attorneys, community leaders, and elected officials.

1. Merits of Claims under California State Law

Objectors represented here by Fred Kumetz, and others ("California Objectors"), have argued that the settlements in these cases are not fair to California class members because they will result in a release of stronger claims available to such persons under California state law. The California Attorney General, two California State Senators, and a number of other California legislators have submitted briefs or letters in support of this argument. The court has considered this correspondence carefully and devoted substantial attention at the hearing to the merits and strengths of proposed California state law claims. For the

reasons described here, the court is not persuaded that California state law issues militate against approval of the settlements here.

(a) California Financial Code

The California Financial Code establishes a comprehensive regulatory scheme governing the business of international money transmitters operating in California. Stanley Cardenas, former Chief Deputy Superintendent and Acting Superintendent of Banks in California, explained that enforcement of the Code is entrusted to the California Department of Financial Institutions (f/k/a State Banking Department), under the supervision of the Commissioner of Financial Institutions (f/k/a California Superintendent of Banks). Violations of the Financial Code may result in an order suspending or revoking the company's license, a cease and desist order, or an action for a civil penalty; in addition, violations may be prosecuted as felonies by state or local law enforcement agencies. *See* Cal. Fin. Code § § 1800-1827; Cardenas Decl. P 27; Cardenas Testimony, Tr. 650:25-651:10. According to the statement of legislative intent and findings, the California Legislature adopted relevant provisions of the Code in 1989 for the stated purpose of protecting consumers from the "unscrupulous practices" of money transfer companies who took money from customers but never transmitted it. Cal. Fin. Code § 1800(a),(b); Cardenas Decl. P 6. The provisions make no reference to any concern about rates of exchange offered by legitimate money transmitters. [2]

(i) Section 1815

Section 1815(a) requires that, at the time of each transaction, the customer must be furnished with a receipt setting forth the rate of exchange, the amount of commission or fees, the net exchange after deduction of fees and commissions, the total amount of currency presented by the customer, and the amount to be delivered to the intended recipient. Objectors to the settlement have argued that the FX spread constitutes a "commission" or "fee" whose disclosure is required by this statute. The court does not agree that such a claim is one that is likely to afford California class members relief for several reasons..

First, in California as in many jurisdictions, the violation of a comprehensive regulatory scheme ordinarily does not give rise to a private right of action. *See Arriaga v. Loma Linda Univ., 10 Cal. App. 4th 1556, 1563-64 (1992); Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58 (1988).* Former California Chief Justice Malcolm Lucas, who authored the *Moradi-Shalal* opinion, explained that if the legislature had intended to create civil liability for such a violation, it could have done so in clear terms. *Moradi-Shalal, 46 Cal. 3d at 295.* A comprehensive regulatory enforcement scheme is ordinarily inconsistent with enforcement by private causes of action. *Id. at 300; Arriaga, 10 Cal. App. 4th at 1563-64; Crusader Ins. Co. v. Scottsdale Ins. Co., 54 Cal. App. 4th 121, 131-34 (1997).* Notably, the California Legislature did create a private right of action for a violation of a different provision in the same Code, a strong indication that the absence of such a right of action for alleged violations of other provisions was intentional. *Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 26, 832 P.2d 899 (1992); cf. Touche Ross & Co. v. Redington, 442 U.S. 560, 571-72, 99 S. Ct. 2479, 2486-87, 61 L. Ed. 2d 82 (1979)* (no implied right of action for damages under § 17(a) of the Securities Act of 1934, where other sections of the Act expressly provide for such rights). In the *Amorsolo* case, a California state judge recently dismissed claims against Defendants under these provisions for the precise reason that there is no private right of action to enforce them. *Amorsolo v. Western Union Fin. Servs., Inc.*, No. BC 222 974 (Cal. Super. Ct. Oct. 23, 2000), slip op. at 7, Ex. C to Corrected Version of Plaintiffs' Submission of Recently Issuesd Additional Authority.

For other reasons, it seems unlikely that a claim under § 1815 would prevail. First, the Code draws a distinction between "commission or fees" and the "rate of exchange," suggesting that the disclosure requirements with respect to the former will not apply to the latter. Further, while California banking officials have been aware for years that money transmitters purchase foreign currency at one rate but offer their customers a less favorable higher rate, *see* Cardenas Decl. PP 30-31, Cardenas Testimony, Tr. 659:8-

664:19, they have never interpreted the statute so as to require disclosures of the exchange rate spread to customers. Finally, the Department's interpretation of the statute is entitled to considerable deference. *See Henning v. Industrial Welfare Comm'n, 46 Cal. 3d 1262, 1269, 252 Cal. Rptr. 278, 762 P.2d 442 (1988);* Lucas Decl. PP 5, 28, Lucas Testimony, Tr. 380:5-21; 393:8-12. An August 13, 1999 letter presented to this court by the California Objectors themselves, written by Senior Counsel Thomas M. Loughran for the Acting Commissioner of Financial Institutions Jan Lynn Owen, confirmed the conclusion that the exchange rate is not to be understood as a commission or fee. *See* August 13, 1999 Letter, Ex. A to California Intervenors' Motion for Leave to Submit Newly Discovered Evidence. ("We do not ordinarily consider a gain to a licensee on an exchange transaction to constitute a fee or charge.") Mr. Loughran acknowledged the hypothetical possibility that a money transmitter might recover a very large – 36% – foreign exchange revenue, and recognized that it "might be contended that the rate differential was a de facto fee" that must be disclosed. Nevertheless, Mr. Loughran concluded that the Department could express no opinion on whether such a contention would be successful in the courts.

Notably, § 1815 makes explicit requirements for disclosure of terms necessary for a customer to understand the financial aspects of a money transfer, including the rate of exchange, the service charge, and the number of pesos the recipient will recover. The rate at which the money transmitter itself purchases pesos is arguably not relevant to the customer and is not mentioned in § 1815. Professor James R. McCall, the California Objectors' expert witness, acknowledged that a consumer would have little reason to be concerned about the wholesale rate at which the money transmitter is able to purchase pesos. Tr. 927-29.

The court concludes any claim under this section is a weak one.

(ii) Section 1810

Section 1810(a) of the Code requires every money transmitter to furnish "equivalent funds to the person

designated by the customer within 10 days after receiving that money" from the customer. The California Objectors have urged that this language requires money transmitters to provide customers with pesos at the same rate of exchange that money transmitters themselves enjoy on the wholesale market. Again, however, any private right of action under this section is unlikely. Further, the California Legislature's failure to expressly prohibit the collection of revenue from FX spreads provides a powerful argument that the Legislature did not intend to do so. As noted earlier, Department officials have been aware of the practices of money transmitters for many years, but have never interpreted § 1810(a) as a prohibition against such practices. As Jim Dibe explained, it would be impracticable for money transmitters to carry out their money exchange practices in the fashion that California Objectors urge is required. Dibe Decl. P 24. Money transmitters purchase currency in bulk without regard to the specific date or rate for each retail transaction, in some instances purchasing pesos after the retail transaction is already complete. Because the wholesale rate fluctuates frequently, it would not be possible to advise customers of the precise exchange rate at the time of the transaction, if that rate must be equal to the rate paid by the transmitter itself. *Id.* P 27. The California Objectors' own expert witness himself acknowledged that § 1810 does not prohibit the practices of Defendants, nor require them to offer their own wholesale exchange rate to their retail customers. *See* McCall Testimony, Tr. 899:15-16; 879:24-871:6; 891:21-899:6; 897:2-3. The court concludes that any claim under § 1810 is a weak one.

(iii) Section 1810.5

Section 1810.5 of the California Financial Code requires a money transmitter to issue a refund to the customer unless the funds are forwarded within 10 days, or the customer instructs the transmitter to make the funds transfer later. There is a private right of action for enforcement of this provision. Available remedies include return of moneys received by the money transmitter, a penalty not to exceed $ 1,000, and attorneys' fees and costs. The California Objectors argue that Defendants have violated this section of the Code,

and that the availability of a $ 1,000 penalty per transaction could generate a huge damages award to California claimants Again, the court is unpersuaded. First, as in § 1810, the fairest interpretation of the term "equivalent" is that it requires that customer funds must be converted at the retail rate of exchange offered by the money transmitter and disclosed on the receipt.

Nor are the Objectors correct that violations of this provision would generate an automatic award of $ 1,000 per transaction; the statutory language reflects that such an award is the *maximum* to be awarded with respect to any violation, not a guaranteed amount per transaction. The court believes that a penalty equal to 40 times the average FX revenue per transaction is most unlikely. At a minimum, the court believes such an outcome is not so likely that the settlements proposed in these cases ought not be approved, particularly where, as here, California claimants might actually be liable for Defendants' attorneys' fees were they to bring an unsuccessful claim under this section.

Notably, the attorneys who represent the California Objectors have filed several complaints against Defendants, but have never asserted a claim under § 1810.5. The court concludes, again, that any claim under this section is a weak one.

(iv) Section 1815(b)

Under section 1815(b), money transmitters must disclose rates of exchange in any window or exterior signs "concerning" those rates, and must clearly state rates of exchange on interior signs and all advertising, "if rates are quoted." The California Objectors argue that because Defendants advertise their service charges ("$ 300 to Mexico for $ 12"), Defendants are required by this section also to disclose the currency exchange rate. For the reasons discussed above, the court believes there is no private right of action to enforce this provision. In any case, the language of this section directs the nature of the disclosures that must be made if an advertisement or sign concerns a rate of exchange, and appears to have no application where the sign or advertisement does not quote or concern a rate of exchange.

Nor have Department officials ever interpreted the disclosure requirements to apply when the advertisement does not quote a rate of exchange. Cardenas Decl. P 18.

The court concludes that any claim under § 1815(b) is a weak one.

(v) Section 1816

This section characterizes "all funds, less fees, received by" a money transmitter as "trust funds." The California Objectors believe this language creates a fiduciary duty claim available to California class members. As noted earlier, however, California law imposes no fiduciary obligations on commercial providers of goods or services. *See McDermott v. Western Union Tel. Co., 746 F. Supp. 1016, 1023 (E.D. Cal. 1990).* Nor have Department officials interpreted § 1816 as prohibiting money transmitters from collecting FX spread revenue. As Stanley Cardenas explained, the Department instead has interpreted this language as authorizing Department officials to segregate funds received from customers in circumstances when the Department seizes the assets of a money transmitter, and protect those funds from the claims of general creditors. Without deciding the issue, the court concludes that claims relating to the "trust fund" language of § 1816 are not so strong that the proposed settlements are unfair to California residents.

(b) California Business and Professions Code

The California Objectors argue that California class members have an additional right of action under the California Business and Professions Code Section 17200 *et seq.* (the "Unfair Competition Law" or "UCL"). That legislation permits a private party to bring a claim for certain unfair, unlawful, or fraudulent business practices. To the extent that the Objectors argue that Defendants' practices are unlawful because they violate the California Financial Code, however, the court rejects this argument for the reasons set forth above.

The Objectors' further argument that, even if not unlawful under the Financial Code, Defendants' practices are "unfair," is not persuasive. Defendants are engaged in business for a

profit. Their failure to disclose their own costs or profit margins is not, on its face, unfair. The fact that California's comprehensive regulation of Defendants' practices does not label the challenged practices unfair is a further defense to any such claim:

Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor.

Cel-Tech Communications v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 182, 973 P.2d 527 (1999) Defendants' argument that their compliance with provisions of the California Financial Code constitutes a "safe harbor" is one that Plaintiffs would have to rebut in order to prevail on their UCL claim. If they were able to do so, the court notes that the only remedies available in such an action would be injunctive relief and restitution. *See* Cal. Bus. & Prof. Code § 17203. Compensatory damages, treble damages, punitive damages, and civil penalties arguably available pursuant to other theories (for example, under RICO or fraud theories asserted in these lawsuits) are not provided by UCL. *Cel-Tech, 20 Cal. 4th at 179; Consumers Union of United States v. Fisher Dev., Inc., 208 Cal. App. 3d 1433, 1443, 257 Cal. Rptr. 151 (1989);* Lucas Decl. PP 40-42.

(c) California Civil Code Sections 1770 *et seq.*

The California Objectors note the California Consumers Legal Remedies Act as yet another source of rights and remedies available to class members. Their theory is that Defendants' advertisement misleadingly suggests that the flat service charge is the only revenue they derive from money transfers, and by so doing constitutes "advertising goods or services with intent not to sell them as advertised." Cal. Civ. Code § 1770(a)(9). Failure of a commercial supplier of goods

or services to disclose its internal costs is not ordinarily deemed false advertising. Nevertheless, in this court's view, a claim of false advertising has more traction than any of the other California state law claims invoked by the Intervenors. Indeed, the California state court denied Defendants' motion to dismiss such a claim in the *Amorsolo* case. *Amorsolo v. Western Union Fin. Servs., Inc.*, No. BC 222 974 (Cal. Super. Ct. Oct. 23, 2000), slip op. at 14. As that court recognized, however, a central defense to such a claim is the argument that the alleged misrepresentation does not relate to material facts; but materiality is generally a question of fact, not an issue that will permit the court to dispose of a claim on a motion. This court suspects that individual plaintiffs or representatives of a class might face difficulty in proving their allegation that "they would have researched whether the rate of exchange offered by defendants was the actual exchange rate to defendants and the best or the market rate of exchange and would not have entered into the subject transactions if they had known that they would be charged more than a purported flat fee." *Id.* at 14-15. Such an allegation might be particularly difficult to prove if it is true, as Mr. Dibe asserted, that virtually every company in the business of providing retail currency exchange services recovers at least some revenue from the FX spread. The California Objectors' suggestion that § 1781(c) somehow insulates claims under this section from a summary judgment analysis is unpersuasive; California courts have concluded that § 1781(c)(3), like summary judgment, "provides a means of resolving CLRA actions prior to trial." *Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 612, 624 (1996).*

On balance, the court concludes this claim, too, is not so strong as to require the conclusion that the proposed settlements are unfair or inadequate with respect to California residents.

(d) California Civil Code Section 51 (Unruh Act)

Finally, the California Objectors have invoked the Unruh Act, which prohibits discrimination against consumers. *See Music Acceptance Corp. v. Lofing, 32 Cal. App. 4th 610, 626 (1995).* As is the case with the claims brought by the

Plaintiffs here, such claims would face the defense that disparate impact claims are not cognizable under this statute. *See Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 1174, n.2, 278 Cal. Rptr. 614, 805 P.2d 873 (1991);* Lucas Decl. P 46. Indeed, in *Amorsolo*, the court dismissed claims under the Unruh Act for this reason. *Amorsolo*, slip op. at 9.

2. Objections to the Form and Amount of Compensation

Sixty-one class members have also objected to the nature and amount of consideration to be provided in this settlement. Not surprisingly, many expressed their preference for recovery of cash rather than coupons. As noted earlier, however, it is not this court's responsibility to determine what agreement would be optimal or most desirable to class members, but rather to determine whether the settlement proposed is fair, reasonable and adequate.

For the reasons discussed above, the court here has concluded that the coupon-based nature of this settlement is fair in the circumstances presented here. The coupons provide significant value to class members because they are freely transferable, immediately available and good for 35 months in any transaction, including where Defendants are offering other sales or promotions. Because class members often engage in multiple or repeat transactions, and because there is a well-connected Mexican community of family and friends, the coupons are more likely to be redeemed than are those offered for "big ticket," one-time purchases. Because Defendants would have insisted on more stringent prove-up procedures for a cash distribution, procedures that could have discouraged undocumented immigrants, coupons arguably enhance the likelihood that class members will participate in the claims process and benefit from the coupons.

More specific objections are discussed below:

(a) Desire for full refund: The court is called upon here to assess a settlement proposal, not the relief that would be accorded Plaintiffs were they to win their claims following

litigation. Accordingly, the court can give little weight to objectors who have asserted that they are entitled to a full refund of 100% of their alleged damages. In light of what this court concludes are strong defenses available to Defendants, the consideration they are offering is significant.

(b) Concerns about coupon use: Several objectors have urged that they will have no further need for Defendants' services, or that they prefer to do business with other providers of money transfer services. As the parties here point out, however, many class members are repeat users of money transfer services; according to the survey research conducted by Dr. Arce, class members engaged in an average of 13.9 money transfers annually. Arce Decl. PP 15-16. The frequency of such transfers defeats the objection that the 35-month redemption period is unreasonably short; to the extent class members are unable to use all the coupons issued to them, this will be the case only because of their comparatively high previous use of Defendants' services. The volume of such transfers is growing, having increased approximately 11% per year since 1995. Garcia y Griego Decl. PP 7-8. In some rural areas of Mexico, Defendants' services are the only available means for reliable electronic money transfers. Garcia y Griego Decl. P 16. For these reasons, the court is not concerned by the fact that the coupons are designed to be redeemable only by each issuing Defendant, rather than by all Defendants or by all money transfer service providers. The court has no jurisdiction over non-parties, and therefore cannot order them to honor the coupons. Nevertheless, nothing in the terms of the settlements would prohibit other companies from honoring the coupons, if business pressures or other considerations lead them to do so.

In any event, because the coupons here are freely transferable at par value, class members who have no need of the coupons may transfer them to others who do. Even if they are unable or unwilling to demand that transferees pay for the coupons, the ability to convey them to others represents a benefit to class members. Nor is the fact that a marketplace for coupons has not already been created a significant concern; such a market may well develop after the coupons

are issued. Obviously, it is not possible to predict with any accuracy the likelihood or degree to which the coupons will be used. Professor Garcia y Griego testified credibly, however, that such factors as migration patterns, repeated money transfers, economic status, social and cultural characteristics, and the history and rationale for use of Defendants' services, all militate in favor of the conclusion that class members will in fact make maximum use of the coupons. Dr. Arce's research indicated that a very high percentage of class members (90%) expected they would use the coupons and that a substantial majority were willing to complete a claim form to obtain them. Arce Decl. PP 19, 26. Professors Miller and Kamins predicted redemption rates in the range of 20 to 30%. Because it is based on a body of research and significant experience, the court found this testimony more credible than that of Mr. Gardner, the Texas consumer advocate called as an expert witness by the California Objectors.

(c) Inadequacy for transmitter of large sums: One class member has complained the settlement is inadequate for class members who, like him, transmitted larger amounts of money to Mexico than the average. The parties here agreed to an average transaction amount of $ 250, the amount found by Professor Garcia y Griego for the average transaction in 1998. The court concludes, however, that it is not unreasonable for the parties to have agreed to a settlement under which the number of coupons distributed is a function of the frequency of transmissions, rather than the amount of each transmission.

(d) Coupons as marketing device: The court shares the concerns of those class members who are fearful that the coupons will function as a "marketing gimmick" that will result in additional profits to Defendants. These concerns are ameliorated to some degree by the fact that the coupons can be used in addition to any other discount, sale, or promotion. Although no provision of the settlements prohibits Defendants from imposing price increases that will erase the benefits provided by the coupons, the court expects that market competition will discourage such increases.

Consumers' ability to enforce such market forces will be enhanced by the terms of the agreed injunction, which will require Defendants to make disclosures that will permit easy price comparison. Unless Defendants have reason to expect that all or nearly all of their customers will be armed with coupons on any given day, Defendants will not readily be able to recoup the amounts represented by the coupons by raising their transaction prices.

The California Objectors are particularly critical of the fact that Defendants will, in their view, "benefit substantially from the additional wire services that they would sell with each coupon redeemed . . . including the revenue Defendants will derive from their continued practice of employing a foreign exchange spread, the very practice of which Plaintiffs complain." (*Intervenors' Proposed Findings of Fact and Conclusions of Law, at 24 P 28.)* Importantly, the practice of recovering the FX spread is not the practice challenged in this lawsuit, nor could Plaintiffs challenge Defendants' collection of profit on the FX margin. What is challenged here is Defendants' failure to *disclose* the recovery of FX revenue, a practice that will be ended by the injunctive relief to which Defendants have agreed.

(e) NACA Guidelines: The court does not share the concern expressed by the California Objectors that the proposed settlements do not meet principles established by the National Association of Consumer Advocates ("NACA"), *see* Standards and Guidelines for Litigating and Settling Consumer Class Actions, reprinted in 176 F.R.D. 375, 378 (1997). These Guidelines are useful, but unofficial and have never been adopted by a court. *See* Gardner Testimony, Tr. 279:16-280:2; Miller Decl. P 41. Nor do the Guidelines persuade this court that the settlements proposed here are inadequate. Mr. Gardner himself acknowledges that there is no requirement that class action settlement coupons have a cash redemption value. Gardner Testimony, Tr. 848:24-849:5. Cash-out provisions are expensive to implement, and arguably unnecessary where the coupons are freely transferable, as they are here. Miller Testimony, Tr. 280:9-282:6. Nor is there any requirement imposed in the case law that the settlement agreement include a minimum redemption

level for coupons. Finally, this court disagrees with the Guidelines to the extent that they suggest that a coupon settlement may be approved only where it provides greater relief than an all-cash settlement would afford; but here, credible evidence demonstrates that Defendants would have offered far less by way of a cash settlement (and would have imposed substantial additional barriers) than they were willing to offer in the form of coupons.

(f) Claims procedure: Objections to the claims procedure provided in the settlements appear to reflect a misunderstanding of the nature of the procedure. Upon approval of the settlements by this court, Defendants will send a claim form to each class member in their computer records, containing a pre-printed record of the transfers that class member made. A class member who agrees with Defendants' calculations need only sign the claim form and return it in a postage-paid envelope. A class member who believes the list of his or her transactions is incomplete may list additional transfers on the claim form and return it. This enables class members who may have used variations in the spelling of their names to obtain the correct number of coupons. Any requirement that Defendants would insist on additional documentation before furnishing the additional coupons is unlikely.

(g) Desire for punishment: Finally, several class members have objected to the settlements as inadequate to "punish" Defendants or to force a change in their rate margin practices. Defendants have, however, agreed that they will make additional disclosures via toll-free numbers, customer receipt forms, and price-related advertising, agreements that will effectively end the non-disclosure practices that were central to Plaintiffs' claims. As previously discussed, Plaintiffs' claims for monetary relief are subject to substantial defenses. The court is not called upon to resolve the merits of this controversy nor to make a precise determination of the parties' legal rights, *see Isby, 75 F.3d at 1196* (quoting *E.E.O.C. v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985)).* The California Objectors' suggestions that Defendants are not entitled to earn any profit on the services they provide, or that the only appropriate settlement would

provide Plaintiffs with a refund of the FX spread, are unrealistic. The court believes the coupon component of the proposed settlements is fair and reasonable.

3. Objections to the Stipulated Injunction

Several class members have objected to aspects of the agreed injunctive relief. For example, some urge that the duration of the injunction (60 months) is too short. In this court's view, however, 60 months is a period long enough to generate permanent change in Defendants' business practices and in the standards of the marketplace. In any event, the court will retain jurisdiction to extend the injunction at the request of Class Counsel for good cause shown.

Some class members assert that the injunction is insufficient because it does not mandate disclosure of the "official" rate of exchange, set such a rate, or regulate money transfer companies. The court has no power to regulate money transfer companies in any fashion other than regulations already imposed by state or federal law, and this objection is not a valid challenge to the settlements because a judgment for Plaintiffs after a trial in these cases would not justify imposition of such regulation. There is no "official" rate of exchange; it is set by international market forces, over which this court has no power.

The California Objectors argue that the injunction will somehow authorize Defendants to violate provisions of California law. The court is unpersuaded. As discussed previously, the interpretations of California statutes pressed by the California Objectors are, in this court's view, somewhat strained. As modified by the injunctions, the court believes Defendants will in fact comply with California law. While this court has no power to authorize a violation of state law, the language of the proposed injunction does not purport to do so. To the contrary, the proposed injunction provides that in the event of a conflict between any portion of the injunctive order and state law, the state statute "shall supersede and take precedence." Nor does the injunction prohibit any state from adopting legislation that would impose additional disclosure requirements on money transfer services.

4. Objections to the *Cy Pres* Proposal

The Seventh Circuit and other courts have recognized that *cy pres* contributions are proper and often are part of class action settlements. Contrary to the California Objectors' contentions, approval of such a fund does not depend on its being composed of unclaimed or residual funds. *See, e.g., Keele v. Wexler, 149 F.3d 589, 592 (7th Cir. 1998)* (approving *cy pres* contribution to legal aid foundation); *Drennan v. Van Ru Credit Corp., 1997 U.S. Dist. LEXIS 7776*, No. 96 C 5789, *1997 WL 305298*, at *1 (N.D. Ill. June 2, 1997) (same); *In re Three Mile Island Litig., 557 F. Supp. 96, 97 (M.D. Pa. 1982)* (approving settlement that provided for $ 20 million to claimants and $ 5 million to finance public health studies and evacuation planning). Particularly in cases like this, where it may well be difficult to locate class members or to ascertain their status, a *cy pres* distribution is useful. *Mace v. Van Ru Credit Corp., 109 F.3d 338, 345 (7th Cir. 1997)* (*cy pres* recovery ideal where "it is difficult or impossible to identify the persons to whom damages should be assigned or distributed."); *Simer v. Rios, 661 F.2d 655, 675 (7th Cir. 1981)* (*cy pres* recovery useful where class members are not likely to come forward and prove their claims or cannot be given notice of the case.")

The classes involved here include undocumented persons who may be reluctant to seek settlement benefits regardless of how simple the claims procedures are. Further, the size, geographic dispersion, and mobility of members of the settlement classes are likely to render class members impossible to locate. The *cy pres* contribution will benefit class members who may never be located by funding charitable and public interest projects that serve the Mexican and Mexican-American communities in the United States.

The California Objectors argue that the *cy pres* provisions are not "narrowly tailored," but the cases they cite are distinguishable. In *In re Folding Carton Antitrust Litig., 744 F.2d 1252, 1254-55 (7th Cir. 1984)*, the funds were designated to establish an "unneeded Foundation" that would provide no benefit to class members. Here there is no argument that the organizations that would be funded by the

cy pres contribution are unneeded or that the funds would not benefit these organizations. In *Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990)*, the Ninth Circuit disapproved of a *cy pres* order granted as part of a judgment, not a negotiated settlement, to an entity without any track record, without any defined purpose, without an established distribution procedure and without any assurances that the plaintiff class itself would benefit. The proposed *cy pres* fund here will be administered by a board that includes representatives from leading Latino charitable groups with substantial records of service, with a clear directive that the funds be used to benefit entities whose primary purposes include service to Mexican Americans or Mexican-American causes. *See* Miller Decl. P 45. The court concludes this description of the recipient organizations is sufficiently specific to provide direction to the independent board charged with the responsibility of reviewing requests for funding. This objection is overruled.

Nor is the court troubled by certain class members' objection that Defendants should not dictate the use of the *cy pres* fund. Under the parties' proposal, the boards will consist of several members, only one of whom will be a representative of Defendants. Lead Counsel Matthew J. Piers and representatives from leading Latino charitable organizations will also serve as members of the boards.

The purpose of the proposed *cy pres* relief is to reach members of the class who otherwise may not benefit from the settlements. For this reason, the court overrules the objections of class members who believe it is improper to provide cash for the *cy pres* fund but not for individual class members. Given the size of the class, distribution of the total *cy pres* distribution to individuals would not significantly enhance the value of the settlement for any class member, and could have substantially increased administrative expenses. The court recognizes that this aspect of the settlements may not directly benefit all class members, but those who have objected can be expected to come forward to claim coupons and to benefit directly. The fact that non-class members may also benefit from the *cy pres* contribution does

not support the conclusion that the court should disapprove this negotiated aspect of the parties' proposed deal.

5. Objections to the Class Notice

Six class members have objected to the form of class notice approved by Judge Williams and re-issued in June 2000 at this court's direction to certain newly identified class members. The language of those notice forms required that class members seeking to object or to opt out should provide proof of class membership by stating "the approximate number" of transactions the individual had conducted each year. The California Objectors offered expert testimony from Mr. Gardner that the proof requirement sets "unnecessarily high burdens" on persons wishing to object or opt out. Contrary to Mr. Gardner's suspicion that class members will have to "conduct research" in order to provide the necessary information, the notice requires only that the class member provide an approximation of the number of transactions he or she has conducted. As Dr. Arce explained, 944 out of 1,114 class members surveyed by telephone were easily able to estimate the number of remittances they had sent in the previous year. This minimal reporting requirement is not burdensome and is a reasonable safeguard against manipulation of the process by non-class members. As the parties note, requiring some proof of membership is commonplace. *See, e.g., In re Prudential Ins. Co. of America Sales Practices Litig., 1999 U.S. Dist. LEXIS 22477, No. MDL 1061, 1999 WL 496491,* at *4 (D.N.J. May 6, 1999) (requiring opt outs to include insurance policy numbers; *In re Chipcom Corp., 1997 WL 1102329,* *20 (D. Mass. June 26, 1997) (requiring number of shares purchased or sold, date of transaction, and price); *In re Conn. Gen. Life Ins. Co., 1997 U.S. Dist. LEXIS 23955, No. MDL 1136, 1997 WL 910387,* at *27 (C.D. Cal. Feb. 13, 1997) (same).

The California Objectors have suggested that the notice is inadequate because "it did not ask about how many people would respond to a cash payment offer, whether they preferred cash to coupons, or approved of the settlement." (*Intervenors' Proposed Findings of Fact and Conclusions of Law, at 9 P 28,* citing Tr. 536-37.) The court recognizes that

many class members would indeed have preferred cash payments. The purpose of class notice is not to canvas class members regarding their preferences, however; it is to advise them of the terms of the agreement which has been reached and provide those who disapprove of those terms an opportunity to object or to opt out. The notice accomplished these purposes.

6. Miscellaneous Objections

A handful of remaining objections can be addressed briefly. Some objections merely reiterated factual allegations of the complaint. One class member objected to Western Union's published transfer fees, which are not the subject of this litigation and are unaffected by the proposed settlements. Two objectors expressed a desire for better, more reliable service and "a free call." Again, these objections are unrelated to the subject matter of this litigation or to terms of the proposed settlement.

One class member objects to the certification of a class for purposes of settlement, arguing that it creates a conflict between the class and counsel. The Seventh Circuit has repeatedly approved settlements negotiated prior to class certification, however, *see, e.g., Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 681, 685 (7th Cir. 1987); Donovan v. Estate of Fitzsimmons, 778 F.2d 298, 300 (7th Cir. 1985); McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 420, 430 (7th Cir. 1977).* For reasons discussed above, the court finds that the settlement of these cases did not raise concerns regarding a conflict of interest between the class and counsel. The settlements were the product of lengthy and difficult negotiations, and there was no resolution of the claim for attorneys' fees for Class Counsel until an agreement had been reached with respect to the merits.

G. Objections to Award of Attorneys' Fees

Several class members objected to the fees that will be awarded pursuant to the proposed settlements. Some suggest that, like class members, the attorneys for Plaintiffs should be limited to a coupon recovery. Even where the relief accorded

is non-monetary, an award of cash for attorneys fees is appropriate. In any event, there is a substantial basis in the record for the conclusion that class members will have continued need for the use of money transfer services. No basis in the record supports such a conclusion with respect to the attorneys for the class members.

Nor is the court inclined to question the reasonableness of the amount of fees for which approval is sought. The negotiated provisions call for payment of a total of $ 10,428,571 in fees in these two actions subject to judicial approval. Such fees will be divided among a team of attorneys from eight law firms. As Frank J. McGarr, former Chief Judge of this court, has observed, the negotiated award in this case is well below the established 30% benchmark for an award of fees in class actions; the amount sought is significantly less than 30% of the face value of the coupons, assuming that 20 to 30% of such coupons are in fact redeemed. National Class Counsel faced extremely high risks in light of the significant defenses that could be raised to each of the claims asserted here. Because the attorneys fees award was separately negotiated and separately funded, it does not reflect any diminished recovery to class members.

The relief negotiated by attorneys for the class is significant. A class member who elects to receive coupons and redeems them can reasonably expect to recover 25% of his average out-of-pocket losses, even using the generous calculus of $ 25 actual loss per transaction. This recovery was achieved in the face of long odds; while these cases were pending, Defendants won motions to dismiss RICO claims in the *Garcia*, *Bueno*, and *Ibarra* actions.

Finally, the court respectfully declines to adopt the proposal of the California Objectors that the award of fees be delayed pending a determination of the number of coupons that are actually redeemed. The court knows of no basis for any suggestion that Class Counsel compromised class claims in return for a greater fee recovery, and the California Objectors have not offered one. Although there can be no guaranteed coupon redemption rate, the court is satisfied from the evidence discussed here that the Plaintiffs'

projections of a 20 to 30% redemption rate is reasonable, and is unwilling to require counsel to become guarantors of circumstances than cannot be dependably predicted by anyone.

CONCLUSION

For the reasons described herein, the court concludes that the settlements is fair, reasonable, and adequate for the settlement class members. The settlements are approved in all respects. The court has considered the objections and overrules them for the reasons presented in this opinion. The court concludes that the parties to the proposed settlements have met their burden of showing that these settlements are fair, reasonable, adequate, negotiated at arm's length and reached in the considered judgment of attorneys fully aware of the facts and the strengths and weaknesses of the claims asserted.

The court will enter an Order and Final Judgment as provided in the settlements. Entry of this Judgment approving the settlements ends the litigation of all claims alleged in these cases. There is no cognizable relationship between entry of judgment as a result of the final approval of these settlements and the matters as to which the court has retained jurisdiction. This Order and Final Judgment will be final and appealable; any perceived need for appellate review is not rendered moot by further developments over which the court has retained jurisdiction.

ENTER:

Dated: December 21, 2000

REBECCA R. PALLMEYER

United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Judgment approving the settlements ends the litigation of all claims alleged in these cases. There is no cognizable relationship between entry of judgment as a result of the final approval of these settlements and the matters as to which the court has retained jurisdiction.

This is final and appealable; any perceived need for appellate review is not rendered moot by further developments over which the court has retained jurisdiction.

December 21, 2000

Date

n1 Nativo Lopez, Co-Director of the Hermandad Mexican Nacional organization, testified that the members of his organization are universally opposed to the settlements, but the court accords this testimony little weight for two reasons. First, Mr. Lopez himself offered to support the settlements in return for a guarantee that his own organization would receive a share of the *cy pres* funds. Second, it was Mr. Lopez, who by then had become an opponent of the settlements, who explained these terms to the Hermandad members in a fashion the court cannot be assured was neutral.

n2 In a letter dated August 25, 2000, well after the conclusion of the fairness hearing in this case, California State Senator Richard Polanco urged this court to exclude California residents from the settlements of these cases. (Letter of Richard Polanco, Ex. A to California Intervenors' Motion to Supplement the Record.) Senator Polanco characterized the FX spread as a "fee or commission" within the meaning of the California Financial Code. A recent decision of our Court of Appeals suggests such a letter is entitled to little consideration by this court. *See Lindland v. U.S. Wrestling Assoc., Inc., 227 F.3d 1000, 1008 (7th Cir. 2000).* Although the court respects Senator Polanco's concerns, it disagrees with his interpretation of the statute, for reasons explained here. In any event, Senator Polanco's

own views on the issue appear to have fluctuated. According to Matthew J. Piers, Senator Polanco initially approved of these proposed settlements and, at two meetings, acknowledged that undisclosed FX revenue is not a "commission or fee" within the meaning of § 1815 and that the failure of Defendants to disclose such revenue was not addressed in the California Financial Code. He told Mr. Piers at a September 1, 1999 meeting that he was aware that Defendants' practices, while objectionable, are not illegal under California law. He explained, further, that the concern that generated these California provisions related to "fly by night operators" who take customer funds and then disappear without transmitting them. (Declaration of Matthew J. Piers in Response to Letter From Senator Polanco, Aug. 29, 2000.)

Nos. 01-1172 & 01-1176

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In the Matter of: MEXICO MONEY TRANSFER LITIGATION

October 29, 2001, Decided

COUNSEL:

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For LEONARD ANDRADE, Plaintiff (01-1176): Mark Brown, Santa Maria, CA.

JUDGES:
Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge.

OPINION:

Order

Intervening Objectors-Appellants filed a petition for rehearing and rehearing en banc on October 18, 2001. No judge in regular active service has requested a vote on the petition for rehearing en banc, * and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

* Judge Williams did not participate in the consideration of the petition for rehearing en banc.

Federal Rules of Civil Procedure , Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in

the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate

orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

California Financial Code § 1800. Legislative intent; Legislative findings and declarations

(a) It is the intent of the Legislature in enacting this chapter to protect the people of this state from being victimized by unscrupulous practices by persons receiving money for transmission to foreign countries and to establish a minimum level of fiscal responsibility and corporate integrity for all entities engaging in the business of receiving money for transmission to foreign countries without regard to the method of transmission.

(b) The Legislature finds and declares that California has a large and diverse population many of whom are concerned with the financial plight of people remaining in the countries which they left. Many of these people are not familar with the varied and intricate financial systems of this state and due to language barriers and other obstacles do not have access to entities offering legitimate money transmission services. In an effort to transmit money to their friends and relatives, these persons give their money to persons under the precept that the money or its equivalent will be immediately transmitted to the designated foreign country. The money is frequently misappropriated or never transmitted. The victims of these practices are generally not aware of the law enforcement services available to help them, thus this unlawful conduct goes unreported.

California Financial Code § 1810.5 . Refunds

(a) Every licensee or its agent shall refund to the customer within 10 days of receipt of the customer's written request for a refund any and all moneys received for transmission to a foreign country unless any of the following occurs:

(1) The funds have been forwarded within 10 days of the date of receipt.

(2) Instructions have been given committing an equivalent amount of money to the person designated by the customer within 10 days of the date of the receipt of the funds from the customer.

(3) The customer instructs the licensee to transmit the moneys at a time beyond 10 days. If the customer gives instructions as to when the moneys shall be forwarded or transmitted and the moneys have not yet been forwarded or transmitted, the licensee or its agent shall refund the customer's money within 10 days of receipt of the customer's written request for a refund.

RIGHT TO REFUND (b) A receipt shall be provided by a licensee or its agent to a customer which shall be made available to the customer in English and in the language principally used by that licensee or that agent to advertise, solicit, or negotiate, either orally or in writing, at that office if other than English. The receipt shall either include or have attached a conspicuous statement in English and in the language principally used by the licensee or that agent to advertise, solicit, or negotiate, either orally or in writing at that office if other than English in a size equal to at least 10-point bold type, as follows:

"You, the customer, are entitled to a refund of the money to be transmitted as the result of this agreement if ——— (name of licensee or its agent) does not forward the money received from you within 10 days of the date of its receipt, or

does not give instructions committing an equivalent amount of money to the person designated by you within 10 days of the date of the receipt of the funds from you unless otherwise instructed by you.

If your instructions as to when the moneys shall be forwarded or transmitted are not complied with and the money has not yet been forwarded or transmitted you have a right to a refund of your money.

If you want a refund, you must mail or deliver your written request to ——— (name of licensee or its agent) at ——— (mailing address of licensee or its agent). If you do not receive your refund, you may be entitled to your money back plus a penalty of up to $ 1,000 and attorney's fees pursuant to Section 1810.5 of the California Financial Code."

(c) A cause of action under this section may be brought in small claims court if it does not exceed the jurisdiction of that court, or in any other appropriate court. The customer shall be entitled to recover each of the following:

(1) Any and all moneys received for transmission to a foreign county, plus any fees and charges paid by the customer.

(2) A penalty in an amount not to exceed one thousand dollars ($ 1,000).

The court shall award the prevailing party costs and attorney's fees.

California Financial Code § 1815. Requirements for receipts for refunds; Display requirements for rates of exchange

(a) The receipt presented to each customer for each transaction pursuant to subdivision (b) of Section 1810.5 shall clearly state the rate of exchange for the particular transaction, the amount of commission or fees, and the net exchange after all fees and commissions have been deducted. The receipt shall also state the total amount of currency presented by the customer and the total amount to be delivered to the beneficiary designated by the customer. These disclosures shall be in English and in the same language as that principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, at that office if other than English.

(b) All window and exterior signs concerning the rates of exchange shall clearly state in English and in the same language principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, at that office if other than English, the rate of exchange for exchanging the currency of the United States for foreign currency. All interior signs and all advertising, if rates are quoted, shall clearly state the rates of exchange for exchanging the currency of the United States for foreign currency and shall state all commissions and fees charged on all transactions.

(c) At each office of each licensee and each agent, there shall be disclosed in those offices in this state the information specified in subdivision (b) in English and in the same language principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, with respect to receiving money or its equivalent for transmission to a foreign country at that office.

(d) If the customer does not specify at the time the currency is presented to the licensee or its agent the country to which the currency is to be transmitted, the rate of exchange for the transaction is not required to be set forth on

– the receipt.

California Financial Code § 1816. Funds received for transmission to foreign country as trust funds; Termination of trust relation

All funds, less fees, received by a licensee or its agents for transmission to a foreign country shall constitute trust funds owned by and belonging to the person from whom they were received until such time as directions have been given by the licensee or its agents for payment abroad of the remittance and funds provided for such payment.

California Business & Professions Code § 17200. Definition

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

California Business & Professions Code § 17203. Remedies and jurisdiction

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

California Business & Professions Code § 17204. Injunction prosecuted by Attorney General, district attorney, or city attorney

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.